Supreme Court, U.S.
FILED
94-97 JUL 18 1994
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER,

Petitioner,

v.

WILLIAM EVANS-SMITH,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES S. GILMORE, III
Attorney General of Virginia

*JOHN H. MCLEES, JR.
Assistant Attorney General

Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for Petitioner

*Counsel of record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

118 pp

QUESTIONS PRESENTED

I. DOES THE NEW RULE DOCTRINE PERMIT A FEDERAL APPEALS COURT TO ANNOUNCE ON COLLATERAL REVIEW OF A STATE PRISONER'S CONVICTION THAT THE CONSTITUTION REQUIRED THE PROSECUTION TO PROVE INDIVIDUALLY AND BEYOND A REASONABLE DOUBT EVERY BASIC FACT, AND EVERY INFERENCE TO BE DRAWN FROM THE BASIC FACTS, THAT THE PROSECUTION RELIED UPON TO PROVE THE PRISONER'S GUILT?

II. DID THE COURT OF APPEALS REFORMULATE AND MISAPPLY THE *JACKSON* "RATIONAL FACT-FINDER" STANDARD THAT GOVERNS SUFFICIENCY-OF-THE-EVIDENCE CLAIMS IN FEDERAL COLLATERAL PROCEEDINGS?

LIST OF PARTIES

The petitioner in this Court, John B. Taylor, Warden of Virginia's Staunton Correctional Center, was the respondent in the proceedings below. The respondent in this Court, William Evans-Smith, a former Virginia prisoner freed as a result of the mandate of the Court of Appeals in this case, was the petitioner in the proceedings below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 2

APPLICABLE PROVISIONS OF LAW 2

CONSTITUTIONAL PROVISION 2

STATUTORY PROVISION 3

STATEMENT OF THE CASE 3

Evidence at Trial 4

Post-Trial Rulings 9

REASONS WHY THE WRIT SHOULD BE GRANTED 14

I. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE RULE ADOPTED BY THE FOURTH CIRCUIT IS NOT DICTATED BY CONTROLLING PRECEDENT AND THEREFORE CANNOT BE ANNOUNCED ON FEDERAL COLLATERAL REVIEW 14

II. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE COURT OF APPEALS' UNAUTHORIZED EXTENSION OF THE *JACKSON V. VIRGINIA* STANDARD 21

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Andersen v. United States, 170 U.S. 481 (1898) 17

Arizona v. Roberson, 486 U.S. 675 (1988) 15

Bullington v. Missouri, 451 U.S. 430 (1981) 15

Burris v. State, 465 N.E.2d 171 (Ind. 1984) 17

Butler v. McKellar, 494 U.S. 407 (1990) 15, 18

Caspari v. Bohlen, 114 S. Ct. 948 (1994) 15, 18

Commonwealth v. Truong, 615 N.E.2d 208 (Mass. App. 1993) 22

Edwards v. Arizona, 451 U.S. 477 (1982) 15

Estelle v. McGuire, 112 S. Ct. 475 (1991) 21

Evans-Smith v. Commonwealth, 5 Va. App. 188, 361 S.E.2d 436 (1987) 2, 4

Frick v. State, 6 S.W.2d 514 (Ark. 1928) 17

Gariepy v. United States, 189 F.2d 459 (6th Cir. 1951) 18

Gideon v. Wainwright, 372 U.S. 335 (1963) 19

Graham v. Collins, 113 S. Ct. 892 (1993) 15

Hughes v. Commonwealth, ___ Va. App. ___, ___ S.E.2d ___ (June 21, 1994) 21

In re Winship, 397 U.S. 358 (1970) 18, 21, 28, 29

Jackson v. Virginia, 443 U.S. 307 (1979) 16, 18, 22, 27, 28, 29

Leland v. Oregon, 343 U.S. 790 (1952) 17

Mackey v. United States, 401 U.S. 667 (1969) 18, 19

TABLE OF AUTHORITIES – Continued

Page

Mullaney v. Wilbur, 421 U.S. 684 (1975) 17

North Carolina v. Pearce, 395 U.S. 711 (1969) 10

Patterson v. New York, 432 U.S. 197 (1977) 17

Penry v. Lynaugh, 492 U.S. 302 (1989) 14

People v. Bryant, 609 N.E.2d 910 (Ill. App. 1993) 22

People v. Eddy, 268 P.2d 47 (Cal. App. 1954) 18

People v. Klinkenberg, 204 P.2d 47 (Cal. App. 1949) 17

Saffle v. Parks, 494 U.S. 484 (1990) 16, 19

Saunders v. Reynolds, 214 Va. 697, 204 S.E.2d 421 (1974) 10

Sawyer v. Smith, 497 U.S. 227 (1990) 18

Schad v. Arizona, 111 S. Ct. 2491 (1991) 20, 22

State v. Barry, 34 A.2d 661 (N.H. 1943) 18

State v. Carroll, 401 S.E.2d 114 (N.C. App. 1991) 22

State v. Davis, 212 S.E.2d 516 (N.C. App. 1975) 17

State v. McDonough, 533 A.2d 857 (Conn. 1987) 17

State v. Nelson, 175 A.2d 814 (N.H. 1961) 18

State v. Raine, 477 P.2d 104 (Id. 1970) 17

Stilwell v. Commonwealth, 219 Va. 214, 247 S.E.2d 360 (1978) 10

Stringer v. Black, 112 S. Ct. 1130 (1992) 15

Teague v. Lane, 489 U.S. 288 (1989) 11, 13, 15, 18, 19

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979) 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Corgain, 5 F.3d 5 (1st Cir. 1993) 22

United States v. Maldonado-Rivera, 922 F.2d 934 (2d Cir. 1990) 27

United States v. Schwab, 886 F.2d 509 (2d Cir. 1989) 18

United States v. Valenti, 134 F.2d 362 (2d Cir.), cert. denied, 319 U.S. 761 (1943) 17

United States v. Viafara-Rodriguez, 729 F.2d 912 (2d Cir. 1984) 17

Victor v. Nebraska, 114 S. Ct. 1239 (1994) 21, 28

OTHER AUTHORITIES

Fourteenth Amendment, United States Constitution 2

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254(a) 3, 18

Virginia Code Annotated § 18.2-32 (Repl. Vol. 1988).....

Virginia Code § 18.2-31 3

Virginia Code § 18.2-32 3

C. McCormick, *Evidence* § 321, pp. 681-82 (1954) 16

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER

Petitioner,

v.

WILLIAM EVANS-SMITH

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 19 F.3d 899 (4th Cir. 1994). (A. 1-29). The Fourth Circuit's order denying the Warden's petition for rehearing and suggestion for rehearing en banc is reprinted in the appendix. (A. 81).[1]

The unpublished order of the United States District Court for the Eastern District of Virginia, which denied

[1] References to the Appendix to this Petition will be designated (A. ___). References to pages of the Joint Appendix filed in the Court of Appeals will be designated (R. ___).

Evans-Smith's petition for habeas corpus relief for the reasons stated from the bench, is reprinted in the appendix, together with the pages of the transcript of the hearing in which the District Court stated its reasons for denying relief on the claim that the evidence was insufficient to support the conviction.

The opinion of the Court of Appeals of Virginia reversing Evans-Smith's first conviction and remanding the case for the new trial which gave rise to the instant litigation is reported as *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987).

JURISDICTION

The opinion of the Fourth Circuit was entered on March 21, 1994. The order denying the Warden's petition for rehearing and suggestion for rehearing en banc was entered April 18, 1994. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS OF LAW

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution states in pertinent part, "[N]or shall any State deprive any person of life, liberty or property, without due process of law. . . ."

STATUTORY PROVISION

At the time of the murder giving rise to this litigation, Virginia Code § 18.2-32 provided that "murder, other than capital murder, by poison, lying in wait, imprisonment, starving, or by any willful, deliberate, and premeditated killing, or in the commission of, or attempt to commit, arson, rape, forcible sodomy, inanimate object sexual penetration, robbery, burglary or abduction, except as provided in § 18.2-31, is murder in the first degree, punishable as a Class 2 felony.

"All murder other than capital murder and murder in the first degree is murder of the second degree and is punishable as a Class 3 felony." (Va. Code Ann. § 18.2-32 (Repl. Vol. 1988)).

The United States Code, 28 U.S.C. § 2254(a), provides that a Federal court "shall entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

STATEMENT OF THE CASE

This case presents clear-cut issues of law which are of nationwide importance concerning Federal habeas corpus review of the sufficiency of the evidence in State criminal prosecutions. In order to understand the nature of the ruling of the Court of Appeals which gave rise to these issues, it is necessary to be familiar with the highlights of

the evidence presented by the prosecution at respondent's trial.

Respondent William Evans-Smith was convicted in State court of the 1985 murder of his wife. Respondent's first conviction was reversed by the Court of Appeals of Virginia when it ruled that the trial court had erred in admitting certain evidence involving the victim's statements that her husband had tried to kill her and describing his anger and hostility. *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987). In 1989, respondent was again convicted by a jury in the Circuit Court of Loudoun County. His conviction was affirmed without published opinion by the Court of Appeals of Virginia and the Supreme Court of Virginia. He then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, challenging, *inter alia*, the sufficiency of the evidence to support his conviction. That court entered summary judgment in favor of Warden John Taylor, and Evans-Smith appealed to the United States Court of Appeals for the Fourth Circuit. On March 21, 1994, the Fourth Circuit reversed the District Court, and held that the evidence was insufficient to support Evans-Smith's conviction. On April 18, 1994, the Fourth Circuit denied the Warden's petition for rehearing and suggestion of rehearing en banc.

Evidence at Trial

In 1985, respondent, employed at American University's Foreign Area Studies Office and a retired Army colonel, lived alone with his wife of over 40 years on their

rural estate in Loudoun County, Virginia. Between 10:30 and 11:00 a.m. on Monday, April 15, 1985, their grown daughter, Leslie Cook, arrived at the home to visit her mother. Sensing something amiss in the house, she used her CB radio to summon two men from a nearby farm. (R. 1160-67). Searching the house, one of them found Barbara Evans-Smith dead on the floor of her second floor bedroom. (R. 245-48, 274-76).

The victim was killed by strangulation with a pair of pantyhose which was wrapped three times around her neck and knotted tightly. (R. 718, 721-22). There was internal hemorrhaging in the back of her head which was consistent with blunt force trauma. (R. 723). The victim's nightgown had been ripped open in front, and she was naked from the waist down. (R. 717, 276). Forensic examination revealed no traces of semen and no vaginal injury. (R. 724).

A poorly-conceived effort had been made to stage the scene to look as if the murder had been committed in the course of a rape or robbery. The local medical examiner who viewed the body in the position in which it was found testified without contradiction that the victim had been placed in that position after death. (R. 927-28). The medical examiner who conducted the autopsy was of the opinion that a pair of panties stuffed in the victim's mouth as if to gag her screams had also been placed there after death. (R. 718, 721-22, 1776-78). A button from the victim's nightgown was found on the floor near her bed (R. 368-69), suggesting that the nightgown had been ripped open in the bedroom rather than earlier during the assault. Although the victim's bedroom was in disarray, the respondent's adjoining bedroom was tidy except

for items of his jewelry which had been laid out across his bed. A substantial amount of silverware on open display in the dining room downstairs had been untouched. (R. 338-39). At the foot of the stairs leading to the second floor, a small table had been laid on its side. This table lay straddling the four impressions of its legs in the carpet, defying the law of physics for a toppled object. Under the table, a drawer which belonged in the table had been laid upside down on the carpet on top of its own contents. Lying nearby on its side on the floor was an arrangement of dried flowers which had been on the table, but there was little or no debris or dried petals strewn across the carpet. (R. 424-27, 544, 1164).

The medical examiner who examined the victim at the scene determined that she had died at approximately 6:00 that morning. (R. 927). His conclusion was based upon a method of estimating time of death which can err as much as two hours in either direction. (R. 929). The respondent had told the police that he had eaten breakfast with his wife at a time which he fixed in one statement as early as 5:30 a.m. on the 15th. (R. 680). The contents of her stomach were found upon autopsy to be consistent with the breakfast which he described (R. 724) and to have been ingested no more than 30 to 60 minutes before her death. (R. 724-25). Evans-Smith told the police that he had left for work that morning at 6:20 or 6:25 a.m. (R. 591). He could not estimate his arrival time at work (R. 591, 681), but told the police he had had difficulty with traffic. (R. 681). The only witness to address the respondent's usual arrival time at work testified that he usually arrived between 7:30 and 8:00 a.m. (R. 814). Other

witnesses placed respondent at work at 8:30 or 8:35 on the morning of the murder. (R. 987).

Two days after the murder, a medical doctor examined respondent's person under court order. (R. 847-48). Scratches were observed and photographed on his hands and one upper arm. (R. 412). The doctor who personally observed these scratches and had seen autopsy photographs of the victim's fingernails testified that in his opinion the scratches could have been caused by human fingernails. (R. 849-50, 1806-08). The two medical examiners, who had personally examined the victim's fingernails but seen only photographs of the scratches on respondent's arm, voiced contrary opinions.

There was evidence from which the jury could have inferred that the victim was initially attacked at the kitchen table, rendered unconscious, and dragged up to her second story bedroom where the final strangulation had occurred. The kitchen table was slightly displaced from its usual location (R. 1164), as was a hutch along the wall near the table. (R. 1164, 247, 344). Two faint, parallel drag marks in the waxed surface on the linoleum floor ran from the kitchen table to the doorway into the front hall. (R. 333, 361, 394). Although the police crime scene technician testified that the victim's soft bedroom slippers would not have made these marks (R. 355-56), there was evidence from which the jury could have inferred that the bedroom slippers were not covering the victim's heels at the time she was dragged, but dangling from her toes and about to fall off in the dragging process. Specifically, one of the slippers was found on the kitchen floor near the entrance to the hallway, and the other slipper was found in the front hallway near the small table which

had been laid on its side. (R. 247). The medical examiner testified that the hemorrhaging in the back of the victim's head could have been caused by bouncing against the wooden stairs if she had been dragged feet first up the stairs. (R. 723-24).

Respondent and his wife owned two Dalmatians which their daughter described as "real good watch dogs." (R. 1161-62). When their daughter first came to the home on the morning of the murder, she found one Dalmatian outside, and the other, which she described as extremely fond of the victim, penned up in a laundry room off the kitchen behind two closed doors. She had never before seen the dog confined in that manner. (R. 1161-62).

Loudoun County Sheriff's deputies first approached the respondent shortly after 3:00 p.m. on April 15th at his office in Washington, D.C. When they informed him that his wife was dead, a fact which he supposedly had not previously known, he responded with a rapid succession of questions, including whether she was disfigured, whether she had been raped, whether she was undressed, how she had been killed, who found the body, and whether his daughter had seen her. (R. 578-79, 664). The investigators described respondent as showing some emotion of crying, but there were "absolutely no tears in his eyes at all." (R. 580, 477).[2] Although he told the

---

[2] *Respondent's own daughter* testified that, upon first seeing her father after her mother's death,

> . . . he was walking towards me, bent over kind of, and he had his arms outstretched and he kept saying, "Leslie, Leslie, Leslie." And we embraced and I kind

deputies he last saw the victim alive as she waved goodbye to him from an upstairs bedroom window (R. 579, 589), he later told friends that she had last waved to him from the first floor kitchen window. (R. 1139, 1174-75). Likewise, although he told the deputies he had made no stops on his way to work that morning (R. 592), he told a co-worker that he had stopped at the University President's office (R. 990), and he later told another person that he had stopped at a carwash. (R. 1148).

Although respondent could not tell the deputies what time he had arrived at work, on April 27th he called a co-worker while the latter was on vacation in New Mexico and asked him what time the co-worker recalled respondent arriving at work on the 15th. When the co-worker responded that he "quite definitely" remembered respondent's arrival at 8:35, Evans-Smith commented that he had told the deputies he had arrived at 8:15, and suggested "that it would be nice if" the two recalled the same arrival time. (R. 990-91).

Post-Trial Rulings

When respondent contended, in a motion to set aside the verdict, that the evidence had been insufficient to support the jury's decision, the trial court denied his motion in a lengthy, carefully reasoned letter opinion. (A.

---

of pushed back away from him and looked at him.
Question: And what did you observe?
Answer: No tears.
(R. 1173-74).

32-43). The Court of Appeals of Virginia affirmed the Circuit Court, finding that:

> [t]he evidence in this case showed that the victim was killed by some criminal agent. There was evidence from which the jury could have found that the petitioner, at the time of her death, was the only person with an opportunity to kill her. Other circumstantial evidence tended to prove his guilt. The totality of the evidence which the jury could have reasonably believed was such that excluded every reasonable hypothesis except that the petitioner was the killer.

(A. 71). The Supreme Court of Virginia affirmed by an unpublished order. (A. 76). This affirmance constituted a judgment on the merits in the Commonwealth's favor. *Stilwell v. Commonwealth*, 219 Va. 214, 226, 247 S.E.2d 360, 367-68 (1978); *Saunders v. Reynolds*, 214 Va. 697, 700, 204 S.E.2d 421, 424 (1974).

In the Federal habeas petition giving rise to this litigation, respondent renewed his challenge to the sufficiency of the evidence along with three other claims.[3] Warden Taylor moved for summary judgment, arguing that the record showed the evidence was sufficient to

---

[3] Respondent contended that *North Carolina v. Pearce*, 395 U.S. 711 (1969), required the trial judge in his second trial to reduce the 20-year sentence recommended by his second jury to duplicate the 5-year sentence which had been recommended by the 1985 jury, that his jury had been tainted by extensive pretrial publicity, and that the Commonwealth's Attorney had misrepresented the evidence in closing argument. The District Court denied respondent relief on these claims, and the Court of Appeals found it unnecessary to consider them on appeal.

support Evans-Smith's conviction, and, in a supplement to his brief in support of the motion for summary judgment, that the new rule doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), required the Federal court to defer to the State Supreme Court's reasonable judgment that the evidence was sufficient to support the conviction. The District Court elected to address the merits without considering the new rule argument, holding that:

> [Evans-Smith] just seeks to have other inferences drawn from [the] testimony. But the jury was not required to do that, and I find that a rational trier of fact could have found beyond a reasonable doubt from this evidence that the defendant was guilty of the murder of his wife.

(A. 80). The Senior District Court Judge felt so confident of his ruling that he denied Evans-Smith a certificate of probable cause to appeal.

Respondent secured his certificate of probable cause from the Court of Appeals, and thereafter a three-judge panel of that Court issued the published opinion giving rise to this petition.

In four key places in its opinion, the Fourth Circuit clearly acknowledged that it was requiring basic facts and preliminary inferences from the basic facts to be proven individually beyond a reasonable doubt:

1. The Court of Appeals reluctantly accorded the jury verdict the benefit of an inference that the scene had been staged, but only because it concluded that, "[w]e believe a rational trier of fact possibly could conclude *beyond a reasonable doubt* that the crime scene was staged." (A. 28, emphasis added).

2. The Court of Appeals thought that a conclusion that the victim had been rendered unconscious in the kitchen and dragged upstairs would require the jury to infer that she had suffered a head injury in the kitchen, and that head injuries from being dragged up the stairs had occurred in the same part of her head. The latter inference the Court characterized as "*unlikely, and subject to reasonable doubt.*" (A. 21 n. 18, emphasis added). Based on this conclusion, the Court quickly concluded that "there is *no* evidence that she was dragged upstairs." (*Id.*, emphasis in original).

3. The Court of Appeals reiterated this conclusion in the following paragraph of the footnote, and then, referring only to the Commonwealth's theory that the victim had been dragged and not, at this point, to respondent's guilt, asked rhetorically, "[w]hat inference was there for the jury to draw *beyond a reasonable doubt*?" (A. 21 n. 18, emphasis added).

4. The Court of Appeals dismissed the testimony clearly indicating that Evans-Smith arrived at work later than his usual time with the comment that, "[s]uch lateness *of itself* is not proof of a crime *beyond a reasonable doubt.*" (A. 12 n. 11, emphasis added).

The rule adopted by the Court of Appeals manifested itself not only in these four express instances, but in many other parts of the Court's analysis where it concluded that basic facts had not been proven beyond a reasonable doubt because the testimony concerning these facts was contradicted, or that reasonable preliminary

inferences from basic facts had not been proven beyond a reasonable doubt because alternative reasonable inferences could have been drawn.[4] The Court summarized its thought process as follows:

> Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven. To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the second.

(A. 29).

Warden Taylor petitioned the Court of Appeals for rehearing, and suggested a rehearing en banc, arguing that the decision applied an incorrect standard, and that the Fourth Circuit had, by its aberrant analysis, adopted a new rule in violation of *Teague*. The Warden's petition and suggestion were denied in an unpublished order issued April 18, 1994.

---

[4] See pp. 23-29 of this petition.

REASONS WHY THE WRIT SHOULD BE GRANTED

In this case a proven murderer was set free because the Fourth Circuit adopted a new rule for the application of the beyond-a-reasonable-doubt standard that is inconsistent with the opinions from this Court, contrary to logic, and in conflict with the express holdings of at least four other Federal Circuits and nine States. Because this case involves the application of the burden of proof that controls every criminal case, it is extremely important that the Court grant certiorari, not only to correct the miscarriage of justice that has occurred in this case, but to insure that State convictions reviewed in this Circuit are not subjected to a standard more stringent than the Constitution requires. The Court can do so either by holding that the Fourth Circuit's rule was not dictated by this Court's case law or by rejecting the Fourth Circuit's rule on the merits, and holding that the beyond-a-reasonable-doubt standard is applicable only to the elements of the offense charged.

I. THIS COURT SHOULD GRANT CERTIORARI TO HOLD THAT THE RULE ADOPTED BY THE FOURTH CIRCUIT IS NOT DICTATED BY CONTROLLING PRECEDENT AND THEREFORE CANNOT BE ANNOUNCED ON FEDERAL COLLATERAL REVIEW.

Because this case involves federal habeas corpus review of a State criminal judgment, the Court "must determine, as a threshold matter, whether granting [Evans-Smith] the relief he seeks would create a 'new rule' " of constitutional law. *Penry v. Lynaugh*, 492 U.S.

302, 313 (1989); *see also Teague v. Lane*, 489 U.S. 288, 301 (1989) (plurality opinion). Although the Court of Appeals purported merely to apply the standard established in *In re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), it is the Fourth Circuit's reformation and extension of the *Winship-Jackson* standard which require scrutiny under the "new rule" doctrine.

> The interests in finality, predictability, and comity underlying [this Court's] new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent *as by the application of an old rule in a manner that was not dictated by precedent.*

Stringer v. Black, 112 S. Ct. 1130, 1135 (1992) (emphasis added); *see Caspari v. Bohlen*, 114 S. Ct. 948 (1994) (rule sought by prisoner would constitute an extension of, rather than being dictated by, *Bullington v. Missouri*, 451 U.S. 430 (1981)); *Butler v. McKellar*, 494 U.S. 407 (1990) (prisoner could not avail himself of the benefit of *Arizona v. Roberson*, 486 U.S. 675 (1988), because *Roberson* had not been *dictated* by *Edwards v. Arizona*, 451 U.S. 477 (1982), even though the *Roberson* majority had said that the case was directly *controlled* by *Edwards*).

New rule analysis under *Teague* requires a federal court first to determine the date when the prisoner's conviction became final. Evans-Smith's conviction became final on December 13, 1990 when the time within which he might have petitioned for certiorari from the affirmance of his direct appeal expired. The second step in *Teague* analysis is to "[s]urve[y] the legal landscape as it then existed," *Graham v. Collins*, 113 S. Ct. 892, 898 (1993), and "determine whether a State court considering

[the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." *Saffle v. Parks*, 494 U.S. 484, 488 (1990); *see Caspari*, 114 S. Ct. at 953.

Although *Winship* speaks in terms of the prosecution proving "facts," the "facts" which it holds must be proven beyond a reasonable doubt are the ultimate facts constituting elements of the offense, because they are referred to as those "necessary to constitute the crime charged," 397 U.S. at 363, 364. The *Winship* opinion is predicated upon the recognition that the beyond-a-reasonable-doubt standard "is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of fact of all the essential *elements* of guilt." 397 U.S. at 361, *quoting* C. McCormick, *Evidence* § 321, pp. 681-82 (1954) (emphasis added).

Federal courts enforcing the *Winship* standard in habeas corpus review of State criminal judgments were commanded to inquire whether any rational trier of fact:

> could have found the essential *elements* of the crime beyond a reasonable doubt. [Citation omitted]. This familiar standard gives full play to the responsibility of the trier of fact *fairly* to resolve conflicts in the testimony, to weigh the evidence, and to draw *reasonable* inferences from basic facts to ultimate facts.

Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis added). *Jackson* thus requires that the trier of fact need only resolve conflicts in the testimony concerning basic facts *fairly*, not beyond a reasonable doubt. Preliminary

inferences from basic facts need only be *reasonable*; they need not be compelled beyond a reasonable doubt.

Decisions of this Court on related issues were consistent with the conclusion that the standard applies only to the elements of the offense, not to basic facts or preliminary inferences. For example, it was clear that indictments need not specify which overt act, among several alleged alternatives, was the means by which a crime was committed. *See Andersen v. United States*, 170 U.S. 481 (1898). In addition, this Court had held that the Constitution permits the States to place the burden of proof of a fact on the defense *if* the fact does not constitute an element of the offense charged. *Patterson v. New York*, 432 U.S. 197 (1977); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Leland v. Oregon*, 343 U.S. 790 (1952).

Insofar as counsel has been able to determine, all lower courts to address this issue as of late 1990 had held that the *Winship* standard "does not operate upon each of the many subsidiary, evidentiary, incidental or subordinate facts, as distinguished from elements or ultimate facts, upon which the prosecution may collectively rely to establish a particular element of the crime beyond a reasonable doubt." *State v. McDonough*, 533 A.2d 857, 862 (Conn. 1987) (Callahan, J., concurring), *citing United States v. Viafara-Rodriguez*, 729 F.2d 912, 913 (2d Cir. 1984), *United States v. Valenti*, 134 F.2d 362, 364 (2d Cir.), *cert. denied*, 319 U.S. 761 (1943); *United States v. Beechum*, 582 F.2d 898, 913 n.16 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); *Frick v. State*, 6 S.W.2d 514 (Ark. 1928); *People v. Klinkenberg*, 204 P.2d 47 (Cal. App. 1949); *State v. Raine*, 477 P.2d 104 (Id. 1970); *Burris v. State*, 465 N.E.2d 171, 186 (Ind. 1984); *State v. Davis*, 212 S.E.2d 516 (N.C. App.

1975); *State v. Barry*, 34 A.2d 661, 663 (N.H. 1943). *Accord*, *United States v. Schwab*, 886 F.2d 509, 511 (2d Cir. 1989); *Gariepy v. United States*, 189 F.2d 459, 462 (6th Cir. 1951); *People v. Eddy*, 268 P.2d 47, 52 (Cal. App. 1954); *State v. Nelson*, 175 A.2d 814, 820 (N.H. 1961).

Although the Fourth Circuit's decision purported to apply *Winship* and *Jackson*, both of which existed at the time respondent's conviction became final, no controlling precedent at that time compelled a conclusion that the *Winship-Jackson* standard applied to basic facts and preliminary inferences as well as ultimate facts. The method of application of the beyond-a-reasonable-doubt standard adopted by the Fourth Circuit thus was not *dictated* by *Winship* or *Jackson* within the meaning of *Teague*. *See Caspari*, 114 S. Ct. 948; *Butler*, 494 U.S. 407. The Fourth Circuit's extension of *Winship* and *Jackson* in this case was, at the very least, one "over which reasonable jurists [could] disagree," *Sawyer v. Smith*, 497 U.S. 227, 234 (1990), as demonstrated by the contrary opinions of three other Federal Circuits and seven States.

The Fourth Circuit's method of application therefore cannot be applied to vacate respondent's conviction in a § 2254 proceeding unless it fits within one of the two exceptions recognized in *Teague*. The first exception, involving rules which place "certain kinds of primary, individual conduct beyond the power of the criminal lawmaking authority to proscribe," *Teague*, 489 U.S. at 311, *quoting Mackey v. United States*, 401 U.S. 667, 692 (1969) (separate opinion of Harlan, J.), obviously is not applicable.

The second exception allows Federal courts on habeas review of State criminal judgments to announce " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Saffle*, 494 U.S. at 495, *quoting Teague*, 489 U.S. at 311. This Court has expressed doubt that many such rules have yet to emerge, *Teague*, 489 U.S. at 313, and the Fourth Circuit's rule in this case is not one of them. "[I]t has none of the primacy and centrality," *Saffle*, 494 U.S. at 495, of rules such as that adopted in *Gideon v. Wainwright*, 372 U.S. 335 (1963). *See Saffle*, 494 U.S. at 495, *Teague*, 489 U.S. at 311, *quoting Mackey*, 401 U.S. at 693-94 (separate opinion of Harlan, J.). To meet this exception, a new rule must be one "without which the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 313. The rule must not merely *affect*, but *"significantly improve"* the fact-finding process. 489 U.S. at 312 (emphasis added).

Adoption of the Fourth Circuit's version of the beyond-a-reasonable-doubt standard would impair rather than enhance the fact-finding process. To paraphrase Justice Scalia's apt hypothetical posed to support a related conclusion:

> When a woman's charred body has been found in a burned house, and there is ample evidence that the defendant set out to kill her, it would be absurd to set him free because . . . [the evidence does not establish beyond a reasonable doubt whether] he strangled her to death (and caused the fire accidentally in his hasty escape), [or whether] . . . he left her unconscious and set the fire to kill her.

Schad v. Arizona, 111 S. Ct. 2491, 2506 (1991) (Scalia, J., concurring in part and concurring in the judgment). The results of the Fourth Circuit's rule may be equally absurd when it is applied in the context of cases, like the instant one, which involve purely circumstantial evidence and an issue of identity, rather than means.[5]

"[T]o consider otherwise innocent circumstances in isolation and conclude that each circumstance standing alone proves nothing concerning [a defendant's] guilt . . . denies reality. Circumstances doe not exist in isolation of one another but exist together with every other proven

---

[5] For example, suppose the prosecution in this case had presented all the same evidence, but in addition had proven that a broken crystal bud vase was found in the victim's clenched hand; that traces of blood found on the vase were of a type inconsistent with the victim's but consistent with the blood of the defendant, as well as approximately sixteen percent of the population, but which for technical reasons could not be subjected to DNA analysis; that an unexplained cut was found on the defendant's person; and that, imbedded in the cut and in his clothing adjacent to the wound were particles of crystal which were identical in color, density, and optical properties to the crystal found in the broken vase. Under the Fourth Circuit's logic, because the prosecution could not prove individually beyond a reasonable doubt the inference that the blood on the vase was that of the defendant, or the inference that the glass particles found on the defendant's person came from the vase, the additional facts would *add nothing at all to the strength of the prosecution's case.* In short, the Fourth Circuit's rule would eliminate reliance on entire categories of circumstantial evidence which common sense tells us can be highly probative when considered in context, but which cannot independently be proven beyond a reasonable doubt because they establish only group characteristics or probabilities rather than individual characteristics.

fact and circumstance in the case." *Hughes v. Commonwealth*, ___ Va. App. ___, ___, ___ S.E.2d ___, ___ (June 21, 1994) (on rehearing en banc). It must thus be concluded that the Fourth Circuit's rule does not come within the second *Teague* exception, and that the Court of Appeals erred in applying this new rule in federal habeas corpus review of respondent's conviction.

II. ALTERNATIVELY, THIS COURT SHOULD GRANT CERTIORARI TO CORRECT THE COURT OF APPEALS' UNAUTHORIZED EXTENSION OF THE *JACKSON V. VIRGINIA* STANDARD.

As previously discussed,[6] the Fourth Circuit's requirement that basic facts and preliminary inferences be proven individually beyond a reasonable doubt is fundamentally inconsistent with the commands of *Jackson*.[7] This requirement gives virtually *no* "play to the

---

[6] See pp. 16-17 of this petition.

[7] Cases decided since respondent's conviction became final continue to support this conclusion. Only last term this Court again described the *Winship* standard as requiring the government to "prove beyond a reasonable doubt every *element* of the charged offense." *Victor v. Nebraska*, 114 S. Ct. 1239, 1242 (1994) (emphasis added). In *Estelle v. McGuire*, 112 S. Ct. 475 (1991), this Court likewise held that "The prosecution must prove all the *elements* of a criminal offense beyond a reasonable doubt," 112 S. Ct. at 480 (emphasis added), and sustained a jury instruction which permitted the jury to consider battered child syndrome evidence as proof that the defendant had caused the injuries resulting in the infant victim's death *if* the jury believed he had caused her prior injuries. In doing so, this Court commented that, "[t]o the extent that the jury may have believed McGuire committed the prior acts and used that as a factor in its

responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. *Jackson* commands that:

> a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences *must* presume – even if it does not affirmatively appear in the record – that the trier of fact resolved *any* such conflicts in favor of the prosecution, and *must* defer to that resolution.

443 U.S. at 326 (emphasis added). Based upon its insistence that each fact or inference be proven beyond a reasonable doubt, the Fourth Circuit simply refused to accord such deference to the conclusions of the jury.[8]

---

deliberation, we observe that there was sufficient evidence to sustain such a jury finding *by a preponderance of the evidence.*" 112 S. Ct. at 483 (emphasis added) (citing cases dealing with preliminary findings of fact concerning prior crimes evidence). On a related subject, this Court has recently held that jury verdicts must resolve only the ultimate facts constituting the elements of an offense, and need not address individual historical facts or preliminary inferences. *Schad*, 111 S. Ct. 2491. Reported opinions from the lower courts other than the Fourth Circuit continue to hold that the beyond-a-reasonable-doubt standard applies only to the ultimate facts constituting elements of the offense, not to basic facts and preliminary inferences upon with the prosecution builds its case. *See United States v. Corgain*, 5 F.3d 5, 10 (1st Cir. 1993); *People v. Bryant*, 609 N.E.2d 910, 919 (Ill. App. 1993); *Commonwealth v. Truong*, 615 N.E.2d 208, 212 (Mass. App. 1993); *State v. Carroll*, 401 S.E.2d 114, 116 (N.C. App. 1991).

[8] Indeed, the Court of Appeals not only reweighed the evidence, but did so by the crude expedient of counting heads among witnesses: "More witnesses stated that [Evans-Smith] had arrived at the normal time than stated that he had been late, thus corroborating Evans-Smith's own statements." (A. 12, n. 11).

As a result, the Fourth Circuit disregarded the strong evidence connecting Evans-Smith with the crime and the evidence of his conduct indicating a consciousness of guilt, and disregarded the significance of the evidence considered as a whole.

Evidence Connecting Respondent with the Crime

Although the Court of Appeals conceded that the evidence adequately established that the scene had been staged, it disregarded the significance of this staging because it concluded that no evidence connected Evans-Smith with the crime. (A. 23 n. 20 and 21). The latter conclusion was a direct result of that Court's refusal to consider basic facts and primary inferences connecting Evans-Smith with the crime because it deemed them not to have been proven beyond a reasonable doubt:

1. The Court of Appeals ignored the fact that Dr. Hocker did not merely testify that the victim "died sometime between 4:00 and 8:00 a.m." (A. 4); he calculated that her death had occurred *at* approximately 6:00 a.m. Notwithstanding his concession that his method of calculation could err as much as two hours in either direction, implicit in the doctor's testimony was that 6:00 was the most likely time of death within that period. His implicit opinion that the method of calculation was reliable enough to be used was adequate reason for the jury to believe that his estimate was probably approximately right rather than substantially wrong. Because the *petitioner himself* told the police he did not leave the house until 6:20 or 6:25, the jury could clearly have inferred that he

was present at the time of his wife's death. Nevertheless, the Court of Appeals disregarded this evidence, concluding that the 6:00 time of death had not been proven beyond a reasonable doubt.

2. The fact that Evans-Smith arrived at work later than was his usual custom was important in the proof of his guilt. Nevertheless, the Court Appeals not only disregarded this evidence because it did not in itself prove him guilty beyond a reasonable doubt (A. 12, n. 11), but ***disbelieved*** the testimony which proved his lateness because the Court found other testimony in the record which it interpreted (wrongly) as contradicting his testimony (A. 12 n. 11; A. 26 n. 27), and ultimately concluded that alternative inferences could be drawn from the evidence: " . . . the medical examiner's estimate would still allow for the victim's being killed in his absence." (A. 27 n. 28).

3. Although one medical doctor testified that in his opinion the scratches on respondent's arm could have been caused by human fingernails such as the victim's, the Court of Appeals evidently disregarded this basic fact as not having been proven beyond a reasonable doubt because two other experts voiced opinions that the scratches could not have been caused by the victim's fingernails. (A. 13-14).

4. The Court of Appeals disregarded the evidence by which the jury could reasonably have concluded that the unconscious victim had been dragged from the kitchen up the

stairs to the bedroom because in its judgment this preliminary inference had not been proven beyond a reasonable doubt. (A. 21 n. 18). Consequently, the Court failed to credit the inference that the attack began at the kitchen table, or recognize the extreme unlikelihood that an unknown intruder would have been able to confine the victim's dog and surprise her at the kitchen table.

5. Although the jury could have inferred, from the hasty and poorly-conceived way in which the scene had been staged, that the crime was unplanned and thus had been committed in a sudden heat of passion, the Court of Appeals evidently concluded that this intermediate inference had not been proven beyond a reasonable doubt, because it opined that, "[n]o evidence of . . . heat of passion was introduced at trial." (A. 18).

6. The Court of Appeals' ultimate conclusion that there was no evidence to link the respondent to the crime caused it to disregard his conduct which bespoke a consciousness of guilt. (A. 24 n. 23).

Respondent's Conduct Bespeaking a Consciousness of Guilt

An additional reason why the Court of Appeals disregarded evidence from which respondent's consciousness of guilt could be inferred was because it judged the preliminary inferences not to have been proven beyond a reasonable doubt:

1. While recognizing the inferences that respondent's phone call to New Mexico was

an attempt to pressure his colleague into giving a favorable account of the time Evans-Smith arrived at work, and that this attempt was motivated by his consciousness of guilt, the Court of Appeals disregarded the latter inference because, in its judgment, "the first inference *might* lead" to an alternative conclusion that respondent had pressured his colleague to change his story to the police even though respondent was innocent. (A. 25 n. 25; A. 16).

2. Because the Court of Appeals concluded that it had not been proven beyond a reasonable doubt that Evans-Smith had arrived at work late, the Court refused to attach any significance to respondent's contradictory explanations for his lateness. (A. 24 n. 24).

3. The jury could infer that respondent's unusual comments to the police when first informed of his wife's death were calculated to highlight the arrangement of the scene to simulate a sexual assault. This incriminating inference, however, was disregarded by the Court for the express reason that the Court perceived no evidence linking respondent to the crime (A. 24 n. 23), and also because the Court chose to draw the alternative conclusion that "such questions might reasonably be expected." (A. 12).

The Significance of the Evidence as a Whole

The natural result of the Fourth Circuit's requirement that basic facts and preliminary inferences each be proven individually and independently beyond a reasonable doubt was that the Court failed to appreciate the

collective significance of the facts which, when separately considered, might appear inconclusive, but when considered as a whole, were mutually corroborative. "Pieces of evidence must be viewed not in isolation but in conjunction." *United States v. Maldonado-Rivera*, 922 F.2d 934, 978 (2d Cir. 1990).

Under a proper *Jackson* analysis, any reviewing court would conclude, as the District Court concluded (A. 80) that the jury could reasonably infer that, because the murderer sought to divert the suspicions of the police by staging the scene to look as if the crime had been committed by an intruder bent on rape and robbery, the crime was actually committed by someone who feared he would be an obvious suspect, and that, of the very small universe of people circumscribed by this inference, only Evans-Smith reasonably could be inferred to have been present at the time of the victim's death. Stated differently, the jury reasonably could conclude that an unknown intruder would not stage the scene to look as if the victim had been murdered by an unknown intruder, and could not have confined the victim's dog in the laundry room and surprised her at the kitchen table. The jury could infer respondent's guilt beyond a reasonable doubt from the extreme improbability of the coincidence that an *innocent* husband would have:

(1) admittedly left the house in which he was alone with his wife at a time which was at least 20 minutes later than the time the medical examiner estimated as her probable time of death;

(2) admittedly arrived at work at a time which was from 15 minutes to an hour later than

when a close associate at work fixed his normal arrival time;

(3) given inconsistent statements to various persons on different occasions concerning errands he had run on the way to work and concerning where his wife was when he last saw her alive;

(4) attempted to pressure a colleague to change his statement to the police to render a more favorable account of when the husband arrived at work;

(5) displayed fresh scratches on his arm which were described by the only medical doctor to have seen them as consistent with scratches caused by human fingernails and inconsistent with the cause to which the defense attributed them;

(6) displayed no shock or tears when first informed by the police of the sudden, violent death of his wife of 43 years, but rather asked questions apparently calculated to highlight and document the appearance of the staged crime scene, and displayed no tears when first embracing his daughter after her mother's death.

"[T]he beyond a reasonable doubt standard is itself probabilistic." *Victor*, 114 S. Ct. at 1247. The probabilities in this case were clearly sufficient to justify the jury's verdict, and the judgment of the Court of Appeals to the contrary was a direct result of its improper method of applying the *Winship-Jackson* standard. Its published opinion applying this analysis is in conflict with the opinions cited above from the First, Second, Fifth, and Sixth Circuits and from nine States. Moreover, because

the countless daily applications of the *Winship* standard occur not only in the published opinions of appellate courts, but in unpublished opinions of appellate and trial courts, and in unwritten decisions of trial courts, from which the prosecution in many jurisdictions has no right of appeal, it is impossible for this Court to know how many other courts are applying or will apply the same analysis used by the Fourth Circuit. It is thus extremely important to the administration of justice that this Court grant certiorari to undo the Fourth Circuit's distortion of the *Winship-Jackson* standard.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

JOHN B. TAYLOR, WARDEN
STAUNTON CORRECTIONAL CENTER

JAMES S. GILMORE, III
Attorney General of Virginia

* JOHN H. MCLEES, JR.
Assistant Attorney General

July, 1994

**Counsel of record*

No. _____

In The

Supreme Court of the United States

October Term, 1994

JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER,

Petitioner,

v.

WILLIAM EVANS-SMITH,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

WILLIAM EVANS-SMITH, *Petitioner-Appellant,* v. JOHN B. TAYLOR, *Respondent-Appellee.*	No. 92-6347

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.

(CA-91-1547-AM)

Argued: December 9, 1993

Decided: March 21, 1994

Before HALL, PHILLIPS, and MURNAGHAN,
Circuit Judges.

Reversed and remanded by published opinion. Judge Murnaghan wrote the opinion, in which Judge Hall and Judge Phillips joined.

COUNSEL

ARGUED: Gerald Thomas Zerkin, GERALD T. ZERKIN & ASSOCIATES, Richmond, Virginia, for Appellant. John H. McLees, Jr., Assistant Attorney General, Richmond, Virginia, for Appellee. **ON BRIEF:** Robert Godfrey, Kristine H. Smith, GERALD T. ZERKIN & ASSOCIATES,

Richmond, Virginia, for Appellant. Stephen D. Rosenthal, Attorney General of Virginia, Richmond, Virginia, for Appellee.

OPINION

MURNAGHAN, Circuit Judge:

Appellant, William Evans-Smith, is serving a twenty-year sentence at Virginia's Staunton Correctional Center for the 1985 murder of his wife, Barbara Evans-Smith. He was first convicted after a jury trial and sentenced to five years imprisonment in August 1985. That conviction was overturned on appeal to the Virginia Court of Appeals on the ground that much of the evidence used to obtain the conviction was either improperly admitted hearsay evidence or evidence that was more prejudicial than probative.

A second trial was set and Evans-Smith moved for a change of venue on account of pretrial publicity; his motion was denied after an extensive hearing. During the course of the second trial, which began on April 17, 1989, nearly four years after the first trial, Evans-Smith filed a Motion to Strike, arguing that the solely circumstantial nature of the evidence presented by the Commonwealth was insufficient to establish guilt. His motion was denied. The jury found Evans-Smith guilty of second-degree murder and recommended the maximum twenty-year sentence. Evans-Smith then moved to set aside the verdict, again arguing that the evidence was insufficient, and also arguing, among other grounds, that the court's prior denial of the motion to change venue deprived him of a

fair trial. He also moved for a new trial based upon alleged juror misconduct. Both motions were denied. Bond was denied, and Evans-Smith was sentenced to twenty years imprisonment.

Evans-Smith appealed through the state system. His appeals were denied. He next filed a state habeas petition, raising only the speedy trial issue. The denial of that petition was affirmed by the Virginia Supreme Court.

The present action is a § 2254 habeas appeal. In the district court, both the Commonwealth and Evans-Smith moved for summary judgment. After a hearing, the district court granted the Commonwealth's motion and denied Evans-Smith's. Evans-Smith appeals the summary judgment entered by the district court on the grounds that the evidence was insufficient to prove his guilt, that his sentence of twenty years following the second trial violated the rule announced in *North Carolina v. Pearce*, 395 U.S. 711 (1969), and that the jury that convicted him was tainted by pretrial publicity.

FACTS

In obtaining Evans-Smith's conviction, the Commonwealth proceeded on the theory that Evans-Smith killed or rendered his wife unconscious in the kitchen of their farmhouse, then dragged her body upstairs and staged a rape/robbery scene before leaving for work. Evans-Smith asserted throughout that he is innocent, that the murder was committed by an unidentified third party or parties, and that the Commonwealth failed to investigate properly the possibility that someone other than Evans-Smith was the murderer.

The prosecution agrees that the evidence used to convict Evans-Smith was entirely circumstantial. According to Loudoun County Medical Examiner Dr. Hocker, Barbara Evans-Smith (hereinafter "the victim") died sometime between 4:00 and 8:00 a.m. on the morning of April 15, 1985. His calculation was based on the degree of rigor mortis (60%) he observed upon his arrival at the crime scene at approximately 1:00 p.m. that afternoon. Dr. Byer, the medical examiner who performed the autopsy, determined that the victim died by strangulation thirty to sixty minutes after eating. The contents of the victim's stomach were consistent with the breakfast that Evans-Smith stated he had shared with his wife.

The victim's body was found in her second-floor bedroom of the couple's Loudoun County farmhouse with a pair of pantyhose wrapped three times around her neck and knotted. She was clad in a nightshirt and robe which had been ripped open, leaving her bare from the waist down. While the condition of her clothing suggested the possibility of a sexual assault, Dr. Byer found no seminal fluid or genital abrasions on the victim. There was a small amount of unexplained blood in her vaginal cavity. A pair of white underwear had been stuffed into the victim's mouth. Dr. Byer stated that the underwear was loosely packed, a fact which could lead to the inference that the underwear had been placed in the mouth after death, since the loose packing would not have served as an effective gag. The Commonwealth urged the jury to consider the underwear as evidence that the murder had been staged as a sexual assault.

Dr. Byer identified internal injury and hemorrhaging to the back of the victim's head which could have been

caused by her head hitting the wooden stairs, as she was dragged to the second floor. The doctor testified, however, that "any blunt force trauma" could have caused the injury. He also noted triangular-shaped abrasions on the victim's neck near her jaw line, which he believed were the victim's fingernail scratches, created while she was trying to remove the ligature from around her neck. There was no blood on the hands of the victim.

The bedroom in which the victim was found looked as if it had been ransacked, with items from the closets and dresser drawers strewn around the room. Evans-Smith's bedroom, separated from the victim's bedroom by a shared bathroom, had a similar appearance, but the rest of the house was in order, with the exception of an overturned, downstairs hall table and slightly skewed furniture in the kitchen. The Commonwealth argued that since only a few pieces of furniture had been moved, and many valuables were left either untouched or "neatly" laid out on the beds upstairs, the crime scene was consistent with a staged crime and not a real robbery.

Evans-Smith's daughter, Leslie Cook, noted in testifying for the prosecution that the front door was ajar when she arrived at the scene at approximately 11:00 a.m., that one of the two dogs was closed up in the laundry room, and that the other was outside. Cook also testified that she observed one set of tire tracks on the newly raked gravel driveway as she came onto the property.

She and another prosecution witness, William Laycock, testified to the presence of another set of tire tracks running across the hayfield toward a second exit on the

morning in question. This second set of tracks was not investigated by the police, and the defense argued at trial that their existence implied that someone other than Evans-Smith had been to the house that morning.[1]

Special Agent Ritchie of the Virginia State Police, a key participant in the investigation of the crime scene, placed bags over the victim's hands and feet upon his arrival to preserve any evidence on them during transport, and collected several other items from the crime scene for analysis, including jewelry boxes which had been tampered with and which Ritchie believed could be fingerprinted.[2] No fingerprints were taken from the furniture and the other items that were found out of place on the first floor. Nor was fingerprinting undertaken along the staircase. Ritchie also observed two parallel scratch marks, which were photographed, on the linoleum floor in the kitchen. Although the Commonwealth attempted to cite these scratch marks as evidence that the victim was killed in the kitchen, then dragged across the floor and upstairs, State Police Special Agent Schultze, testifying for the prosecution, stated that the scratch marks could not have been caused by the soft slippers the victim was apparently wearing at the approximate time of the murder. Her slippers were found in different rooms on the first floor. At oral argument, the Commonwealth

---

[1] Under cross-examination, Laycock, a friend of Cook and an early arrival on the crime scene, stated that it would have been unlikely that Evans-Smith, a farmer, would have driven through this particular field, as such a path would have damaged his crops.

[2] The results of the fingerprint analysis are not indicated in the record, and neither party makes mention of them.

asserted that its argument was that the victim's bare heels had created the marks.

Among the evidence collected by Ritchie were seventy-three individual hair samples from around and on the body of the victim and from the stairway leading to the second floor, tissues removed from the wastebasket in the shared bathroom, the victim's nightshirt and robe, and various other items.

Of the fourteen hair samples taken from the stairway, Forensic Scientist Deanna Dabbs found ten of them to be unidentifiable, three to be consistent with the hair of the victim (one of which had been forcibly removed), and one blond head hair to belong to neither the victim nor to Evans-Smith. Thirty-nine of the fifty-nine hair samples taken from the victim's body or bedroom were found to be consistent with the victim's hair, seven were unidentifiable, and seven were consistent with the hair of Evans-Smith. None of the hair attributed to Evans-Smith had been forcibly removed. Of the remaining hair, one brown caucasian head hair taken from the bag enclosing the victim's clenched left hand was found to belong to neither the victim nor to Evans-Smith.[3] Five hair samples

---

[3] Whether this hair was found in the closed hand or simply in the bag is disputed. Not disputed is that the bagging technique is used to preserve the evidence. The person responsible for bagging the victim's hands testified that the purpose was to preserve evidence and that he did his job properly. While the Commonwealth argued to the jury that the hair probably came from one of the investigators on the murder scene (an admission that their investigative procedures were flawed), *no* effort was made to match the hair found in the evidence bag with that of any of the investigators on the scene.

taken from a pubic combing of the victim were definitely not Evans-Smith's, and could not be identified as belonging to the victim.[4]

Dabbs analyzed several small blood stains on the victim's robe and a blood-stained tissue from the shared bathroom's wastebasket. There was also a band-aid found in the wastebasket with an amount of blood on it too minute to test. Two of seven blood stains on the robe were consistent with the same type as Evans-Smith's blood.[5] Blood of the same type as Evans-Smith's was also found on a tissue retrieved from a wastebasket in the shared bathroom.

Evans-Smith told the police that he and his wife had cleared limbs, thorny locusts, and other brush from parts of their farm on the Saturday and Sunday morning preceding Monday's murder.[6] Commonweaith witnesses corroborated this statement. While clearing the brush, Evans-Smith allegedly acquired several scratches on his arm and hands. At about noon on Sunday, after patching up his scratches with large band-aids, Evans-Smith and his wife attended the Oatland Point-to-Point horse race. Upon their return that afternoon, Evans-Smith raked the gravel driveway with a york rake.

---

[4] Hair samples sometimes may be identified as belonging to a specific person, sometimes a specific person may be ruled out as the source of the hair, and sometimes the test simply cannot determine whether the hair belongs to a specific person or not.

[5] Dabbs, a prosecution witness, testified that the blood was not only consistent with Evans-Smiths', but also with that of 58% of the population.

[6] Evans-Smith did not testify in the second trial, although he did in the first.

Evans-Smith stated to investigators that he arose on the morning of the murder at 5:00 a.m., as usual, and drove down the one-quarter mile lane to the mailbox to retrieve the newspaper.[7] While at the mailbox, Evans-Smith claimed, he caught a glimpse of a dark-colored van parked on the road near a neighbor's driveway, but thought nothing of it.[8] He returned to the house, placed the newspaper on the hood of his wife's truck – as was

---

[7] Evidence was introduced that it was Evans-Smith's habit to walk down the driveway to pick up the newspaper, but that sometimes he drove. Apparently, the prosecution hoped to show that he had in fact walked, not driven, down the driveway to get the paper. His having walked would make consistent evidence from his daughter that there was but one set of tire tracks on the drive, and call into question Evans-Smith's statements concerning his sighting of the dark-colored van. *See infra*, text at note 8.

The testimonial evidence as to the tire tracks was disputed by the defense, which asserted that the york rake itself necessarily would have created a set of tracks, making it impossible for there to have been only one set. In addition, evidence was submitted to the effect that the driveway was narrow, and that it was common that one car would follow the tracks of another.

[8] The prosecution called a number of witnesses who testified that they had driven on the road in question on the same morning and had never seen a dark colored van. None of these witnesses had driven past the point where Evans-Smith said he saw the van within fifteen minutes of either side of the alleged sighting. A witness for the defense testified that she had seen a green van with Louisiana plates speeding through the area. The van had cut her off, and had acted strangely enough that she reported it to the police. Patricia Packard, who lived opposite the entrance to Evans-Smith's driveway, testified that she remembered hearing and seeing a dark-colored vehicle hurriedly departing the Evans-Smith driveway the morning of the murder between 9:00 and 11:00 a.m.

their custom – and completed some farm chores. Evans-Smith stated that he returned to the house to breakfast with his wife at approximately 6:00 a.m., and after signing a birthday card for their son-in-law at his wife's request, kissing his wife goodbye in the kitchen, and watching her wave to him from her upstairs bedroom,[9] he began his one and one-half to two hour commute to American University's Foreign Area Studies Office in Washington, D.C.[10] According to Evans-Smith, the traffic coming into the city was "extremely slow" that morning. The prosecution put on witnesses who testified that there had been nothing extraordinary, such as accidents, about the traffic that morning. The Commonwealth argued that Evans-Smith complained "bitterly" about the traffic, and that his reaction was inconsistent with the normal state of rush hour traffic.

The trial transcript suggests that Evans-Smith did complain, but perhaps not "bitterly." The testimony of a co-worker was that

> [Our conversation] was concerned with the traffic that morning, that it was exceptionally bad.

---

[9] The prosecution presented evidence that Evans-Smith had been inconsistent, telling at least one person that his wife had waved to him not from upstairs, but from the kitchen window – both were on the same side of the house. This contradiction typifies the sort of attenuated evidence on which the prosecution relied in asserting that Evans-Smith concocted a story about the circumstances of that morning.

[10] No evidence was submitted by the Commonwealth as to the time Evans-Smith's commute customarily took. Nor was any evidence submitted demonstrating that the time Evans-Smith said it took to travel the distance on the day of the murder was implausible.

> The traffic was very often bad coming over the Cabin John Bridge and it was exceptionally bad that morning, yeah.
>
> And Mr. Evans-Smith was upset . . . in a way that is not abnormal with the traffic.

Two investigators who interviewed Evans-Smith two days after the murder testified that Evans-Smith told them at that time he had not made any stops on his way to work. He later told someone else and testified at the first trial that he had stopped at the university president's office to drop off some books. The office, however, was closed, and he proceeded on to work. According to prosecution witness Mimi Tandler, who was writing a book on the case, Evans-Smith told her *after the first trial* that he had stopped at a car wash on the way to work.

Evans-Smith stated that he arrived at his office at approximately 8:15 a.m. or "some time before 8:30 a.m." Evans-Smith's co-worker, Dorothy Lohman, testified that Evans-Smith usually arrived at work between 7:30 or 8:00 a.m., but that he was not at his desk at 8:45 a.m. when she went to his office. She had a meeting with Evans-Smith concerning edits of a manuscript later that morning, however, at which time he appeared completely normal. Prosecution witness and coworker James Rudolph testified that the office arrival time was flexible and that it was normal for people to arrive between 8:00 and 8:30 a.m. He further testified that he had spoken with Evans-Smith in the office parking lot at 8:30 or 8:35 on the morning in question. This conversation was the source of the comments about the traffic. A defense witness stated that Evans-Smith arrived at work on April 15 between 8:00 and 8:30 a.m. Yet another stated that he had spoken with

Evans-Smith in the men's bathroom on the same floor as Evans-Smith's office at 8:30 a.m.[11]

Evans-Smith was contacted by the police at his office and told of the murder that afternoon. Lieutenant Brown and Investigator Merchant testified that Evans-Smith then asked a series of questions about whether his wife had been raped or disfigured, whether she was clothed or not, where she was located, and who found her. Although such questions might reasonably be expected, the prosecution argued that such questions suggested he knew what the murder scene looked like, and, in any event, were odd reactions for someone told of the murder of his wife. Brown testified that as soon as he told Evans-Smith

---

[11] The dispute over the time of Evans-Smith's arrival provides a useful illustration of the quality of the evidence in this case. The prosecution argued that the "inconsistency" in the statements about when he arrived, combined with an arrival time which, according to one witness, was later than usual, suggests that Evans-Smith was otherwise engaged that morning, and that he had lied about his whereabouts. Our task emphatically is not to reweigh the evidence; however, even viewing the evidence in a light most favorable to the prosecution, it is difficult, if not impossible, to determine why his arrival time, which at the most was only somewhat later than usual, indicates anything about Evans-Smith's activities that morning. Anyone with a daily commute of up to two hours in rush hour traffic could reasonably be expected to arrive late. Such lateness of itself is not proof of a crime beyond a reasonable doubt. Moreover, more witnesses stated that he had arrived at the normal time than stated that he had been late, thus corroborating Evans-Smith's own statements. Indeed, the witness who said that Evans-Smith had been late (*i.e.*, later than 8:45) based her conclusion on her *not* having seen Evans-Smith in his office, while the witnesses who testified that he was there by about 8:30 actually saw him.

that a burglary had occurred, Evans-Smith gasped, "Oh my God, the van," and then provided a description of the van, as noted above.

The investigators and Evans-Smith then left Washington for Loudoun County. The investigators, who trailed him on the way back, testified that Evans-Smith, upon reaching stop lights, would put his head in his hands or, alternatively, look in his rear view mirror.

When they reached the farm in Loudoun County, Evans-Smith was not allowed to visit the crime scene to see his wife's body. He engaged in a physical tussle with the authorities, during which they first observed several scratches on his arms.[12] The scratches on his arms were the source of much testimony at the trial. The prosecution's theory was that the scratches were caused by the victim's fingernails in the course of a violent struggle with Evans-Smith. The Commonwealth based its argument on the testimony of its witness, Dr. Solin, who had examined Evans-Smith's scratches and had determined

---

[12] The defense argued to the jury that the Commonwealth's refusal to allow Evans-Smith to see the body, combined with its refusal to investigate any alternative theories and its insufficient fingerprinting, suggested that the authorities already considered him a suspect, especially since other individuals had been allowed on the scene. The Commonwealth argued that when Evans-Smith was invited to view the body several days later and after the autopsy, he refused, demonstrating that the tussle in front of his house was not genuine, but merely a performance. Yet, if he had shown indifference in seeing his wife's body at the first possible moment and then sought to see the body several days later, the prosecution would no doubt have instanced the scenario as proof of murder.

that they could have been caused by the victim's fingernails. He testified that his knowledge of the fingernails was based on Commonwealth photographs. Dr. Solin did not himself examine the victim's fingernails. Two other prosecution witnesses, who saw only photographs of Evans-Smith's scratches but had made a careful inspection of the victim's fingernails, concluded that her fingernails could *not* possibly have caused the scratches. These two witnesses, Loudoun Medical Examiner George T. Hocker and Virginia Deputy Chief Medical Examiner Dr. James C. Byer, both testified that the victim's fingernails were too short and dull to have made the scratches. They opined that the scratches were more likely made, as Evans-Smith claimed, by his work clearing thorn bushes.[13] Evans-Smith's daughter, who testified for the prosecution, stated that she had seen her parents clearing out thorn bushes the day before the murder. Moreover, the only debris found under the victim's fingernails was identified by the prosecution witnesses as having resulted from her attempts to release the ligature from around her neck. None of the debris was consistent with Evans-Smith's blood or skin; indeed, there was no blood on the victim's hands at all. Evans-Smith had stated that the blood found on the tissues and medicated band-aid in his bathroom had come from his and his wife's having

---

[13] The Commonwealth attempted to refute this finding by putting on testimonial evidence that Evans-Smith ordinarily wore gloves when he worked on the farm. There was testimony, however, that he did not always wear gloves.

Several prosecution witnesses who had seen Evans-Smith at the Point-to-Point race the day before the murder testified that they had not seen any scratches or bandages the day of the race. Two defense witnesses testified that they had in fact seen bandages on his hands.

treated his scratches from the thorns. Prosecution witness, Dabbs, testified that the spots on the victim's robe might have been placed there at different times, one stain having been on the robe as long as eight weeks previously, and the other less than one month previously. The test was not capable of determining whether the blood had been placed on the victim's robe the day of the murder.

On the evening of the murder, after the day's investigation had concluded, Evans-Smith was asked by the authorities to make a list of any items he believed were missing from the house. Two days later Evans-Smith asked to speak with Investigators Brown and Merchant. During the ensuing interrogation, he mentioned that his wife kept her jewelry and hay money in an aqua jewelry box in her bedroom. Prosecution witness Joe Rogers, a farmer who leased and cultivated the land adjoining Evans-Smith's farm, testified that Evans-Smith had phoned him ostensibly to discuss that year's planting. During the course of the conversation, Evans-Smith asked him to keep an eye out for anything suspicious that he might find and report it. Shortly thereafter, an employee of Rogers, while discing the neighboring field, found the aqua box in the field, slightly covered by dirt. There were no fingerprints on the box, but its composition as well as the time it had been exposed to the elements made it unlikely that such fingerprints would still exist.

Several other facts bear mention. During the week following the murder, Evans-Smith called his coworker, Rudolph, who was then vacationing in New Mexico. During their conversation, Evans-Smith related that he had been indicted, and he believed the state had bungled the

investigation. He then related to Rudolph his activities on the morning of the murder, telling him of the stop at the president's office and his late arrival at the office. He seemed concerned, however, that Rudolph remembered his arrival time to be approximately 8:35, because he had already told the police that he thought he had arrived at work at 8:15 a.m. According to Rudolph, Evans-Smith mentioned that "it would be nice if he and I recalled the same time of arrival that morning." The Commonwealth argued that the conversation was evidence that Evans-Smith was trying to make other people's stories consistent with his own. Rudolph testified, however, that Evans-Smith did not threaten him, and that "he was not noticeably angry. I'm sure he was upset, everybody was upset." Rudolph testified that Evans-Smith was not angry with him. In addition, he testified further that his watch often ran five minutes fast, and that he could have seen Evans-Smith at 8:30 rather than at 8:35 a.m.

Evans-Smith attempted, with no success, to have the police investigate the possibility that two horse trainers, Robert Rivera and Rudy Ruiz, who were working at a horse barn on adjacent property at the approximate time of the murder, may have been involved in the crime. In support of this theory, Evans-Smith pointed to the fact that Rivera was on a $100,000 bond for drug charges and that he had been ruled off of the Charles Town race track, after drugging horses. There was some suggestion that Rivera's whereabouts on the morning of the murder were inconsistent with his statements at trial. The Rivera theory suffers from incomplete development in the record.

On the basis of the foregoing evidence, essentially all there is, William Evans-Smith was convicted of the second degree murder of his wife of over forty years.

DISCUSSION

The standard of review for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, *Goldsmith v. Witkowski*, 981 F.2d 697, 701 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993), and according the benefit of all reasonable inferences to the government, *United States v. Tresvant*, 677 F.2d 1018, 1021 (4th Cir. 1982), any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). The standard is obviously rigorous. As the Supreme Court recently has reiterated, "the writ of habeas corpus has historically been regarded as an extraordinary remedy." *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1719 (1993). Nevertheless, however circumscribed, the writ remains a remedy, "a bulwark against convictions that violate fundamental fairness." *Id. (quoting Engle v. Issac*, 456 U.S. 107 (1982)) (internal quotation omitted).

The very existence of the *Jackson* test

> presupposes that juries accurately charged on the elements of a crime and on the strict burden of persuasion to which they must hold the prosecution, nevertheless "may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." [The test] was adopted to provide an additional safeguard against that possibility, and was to give added assurance that guilt

> should never be found except on a rationally supportable *"state of near certitude."*

West v. Wright, 931 F.2d 262, 268 (4th Cir. 1991), *rev'd on other grounds*, 112 S.Ct. 2482 (1992) (quoting *Jackson v. Virginia*, 443 U.S. at 315).

The question before us in the instant case, therefore, is whether the wholly circumstantial evidence, taken together, could allow any rational trier of fact to conclude *beyond a reasonable doubt* that Evans-Smith murdered his wife. In conducting such an inquiry we consider all the evidence presented in the record.

The prosecution's theory of the case was that Evans-Smith, the victim's husband, for whatever reason but probably in the heat of passion (of which there was no proof), murdered his wife or rendered her unconscious in the kitchen after the two had breakfast. No evidence of motive nor of heat of passion was introduced at trial. Indeed, the only evidence before the jury was that the Evans-Smiths had been seen the day before the murder enjoying one another's company. The prosecution's theory was that he then dragged his wife up the stairs, and placed her on the floor of her bedroom. Realizing, according to the prosecution, that he would be a primary suspect, Evans-Smith then supposedly staged a robbery/rape scene and drove to work, perhaps arriving a little later than usual. According to the Commonwealth, Evans-Smith's statements and behavior after the crime suggested to the prosecution an attempt to cast blame elsewhere, lending further supposed support to the conclusion that he in fact had committed the murder and then had attempted to cover it up.

A comprehensive review of the facts has been set out above, but, at the risk of repeating many of them, it seems worthwhile to explore fully the facts on which the Commonwealth particularly relies in its brief. They are quoted at length as follows:

1. When the victim's daughter arrived at the home that morning, she found one of her parents' two dogs, significantly the one which she described as more protective of the victim, penned up in the laundry room. The daughter had never seen the dog thus confined before.[14]

2. The victim, a 64-year-old woman, was found naked from the waist down, with her nightshirt torn open and a pair of panties placed in her mouth in a manner so as to suggest that they had been used as a gag. She was killed by strangulation with a ligature, consisting of a pair of pantyhose wrapped three times around the neck and knotted.[15] Her room was in disarray, with

---

[14] The fact is meant to support an inference that, since Evans-Smith knew the dog's habits, Evans-Smith would know which of the two dogs he had to lock up to commit the crime. While we can give the prosecution the benefit of the inference that the dog was locked up because it was more protective of the victim on the day of the murder than the other dog, it is unclear why *any* attacker (Evans-Smith or someone else) would not have noticed the difference in protectiveness of the two dogs, if that difference were as great as the prosecution suggests.

[15] All parties assume that the pantyhose belonged to the victim. The Commonwealth asserted that they were particularly convenient to Evans-Smith, since he would have known their location. Another pair of pantyhose was found, in plain view, in a dish on top of the victim's dresser.

drawers pulled from dressers and various items from the closet placed on the floor. A button which matched her nightgown was found under the bed next to where she lay[,] establishing that the nightgown had been ripped open in the bedroom.[16]

3. The kitchen furniture was out of place, there were drag marks consistent with the victim's heels being dragged across the kitchen floor,[17] and a table was overturned in a hallway leading from the kitchen to the stairs to the victim's room. The autopsy revealed head injuries which could have been caused by the victim's head hitting the stairs as she was dragged from the kitchen, up the stairs to her room.[18]

---

[16] The inference meant to be drawn here, particularly from the button, is that having been killed in the kitchen and dragged up the stairs, the victim's gown was torn open after she had been placed dead on the floor of her bedroom. The inference is somewhat remotely meant to support the theory of a staged rape.

[17] The statement that the marks were consistent with the victim's being dragged is simply unsupported by the record. Indeed, the record suggests that drag marks *could not* have been made by the heels being dragged. The prosecution's witness Schultz, a state crime scene technician, clearly stated that the slippers the victim apparently had been wearing could *not* have caused the drag marks on the linoleum floor. No evidence was adduced supporting the prosecution's assertion that the victim's bare heels, had she not been wearing slippers, caused the marks.

To the extent, therefore, that the Commonwealth's theory is helped by the murder having been committed in the kitchen, and the body having been dragged up the stairs, the marks do not appear to support such an inference.

[18] It is somewhat unclear as to whether the prosecution advanced the theory that Evans-Smith killed his wife in the

4. There was no evidence that the victim had been sexually molested in any way. There were no bruises, abrasions or tears on her

---

kitchen and then dragged her upstairs, or whether he knocked her out in the kitchen, and then strangled her upstairs. In his closing argument, the Commonwealth's attorney suggested that he was advancing either theory, "The evidence is, I would submit, that she was either rendered unconscious at the table *or* strangled at the table and dragged upstairs." Plainly, the theory that she was "rendered unconscious" raises a difficult problem for the Commonwealth's theory that the victim's head was bruised as she was being dragged up the stairs. The record suggests that the victim's head suffered a defined internal contusion; even if the contusion represented more than one head injury (an inference not supported by the record), all of the injuries – those caused by being rendered unconscious and those caused by the stairs would have had to occur in the same part of the head. To say the least, this seems unlikely, and subject to reasonable doubt. If the victim's head did not hit the stairs and the skid marks on the kitchen floor were not caused by her slippers, there is *no* evidence that she was "dragged" upstairs. In order to remain consistent with the Commonwealth's theory, we would have to infer that Evans-Smith, a 64-year-old man in admittedly good shape, knocked out his wife and then carried or dragged her upstairs without doing any further damage to her body or any damage to the house. In that connection, it is worth noting that the victim's body was carried down the stairs by three medical technicians, one of whom noted that she was heavy.

Finally, the bruise on the victim's head could have been caused, according to the medical examiner, by any blow. The idea that the blow was caused by a step was inventively advanced by the prosecution to support the dragging theory. As stated before, there is no evidence that she was dragged, therefore there is no more evidence connecting the blow on the head to a step than there is connecting the blow to any other blunt object. What inference was there for the jury to draw beyond a reasonable doubt?

breasts or genitalia, nor was there any evidence of seminal fluid anywhere on her body, clothing or bedclothes.[19]

5. Dr. Hocker, the medical examiner who responded to the scene, testified without contradiction that the victim's body had been placed where it was found, and that she had not fallen dead there. His opinion on this was not questioned on cross-examination. It was stipulated that the testimony of Dr. Beyer (sic), the medical examiner who performed the autopsy, would be that the panties probably were placed in her mouth after she was strangled. Since there would be no need for a gag after the victim had been killed, both of these observations support the conclusion that the scene was "rigged" to look like something other than what it was.[20]

6. Other than the victim's room, the defendant's bedroom was the only other room in the house that showed any signs even vaguely consistent with a burglary. Two

---

[19] There was at least a little blood in the victim's vagina. Obviously, sexual assaults frequently occur without physical trauma or evidence being left behind. Nevertheless, viewing the evidence in a light most favorable to the prosecution, it is plausible that involved was someone who wanted the crime scene to appear consistent with that of a sexual assault.

[20] The prosecution urges us to believe that the crime scene was staged. Even if a rational fact-finder would accept this theory, the Commonwealth's bald assertion that no one but Evans-Smith would have staged the crime scene simply is insufficient ground for us to conclude that a rational fact-finder could connect Evans-Smith beyond a reasonable doubt to the killing.

jewelry boxes had been emptied on the defendant's bed, but the photographs revealed that the contents had been spread neatly out on the bed, and items of obvious value were left in place. Silverware was left untouched in other rooms.[21]

7. There was no evidence that anyone other than the defendant had been in the home on the morning of the killing. There was no blood at the scene other than blood consistent with the victim and the defendant. Blood consistent with the defendant's blood was found on tissues in a waste-basket in the room where the victim's body was found.[22]

---

21 There was testimony that a friend of the victim's had called the house and let the phone ring three times sometime after 8:00 a.m. The defense suggested that the repeated phone calls could have scared the intruders away before they completed the crime. While we note the defense's theory is not implausible, we must give the benefit of the inference to the prosecution. That inference suggests that someone staged the crime scene.

Even if we infer that the "staged" quality of the crime scene suggests a cover-up, there is nothing linking Evans-Smith to the crime, except for the unsubstantiated prosecution's theory that no one else could have had any reason to stage a rape and robbery.

22 While all inferences must be made in favor of the prosecution, leaps of logic should not be. Here, the Commonwealth asserts that the bloody tissues were left behind by Evans-Smith, who had used them to wipe scratches caused by a struggle with his wife, though prosecution evidence was to the effect that the victim could not have caused the scratches. Such careless littering by Evans-Smith would be, at the very least, somewhat inconsistent with the theory that he had killed his wife, and then had attempted to stage a robbery scene.

8. When informed of the fact that his 64-year-old wife had been killed, the defendant asked a series of considered objective questions which the jury could infer suggested his awareness of the appearance of the scene of the crime, and were calculated to highlight the staging of the scene to simulate a rape and robbery by an unknown intruder. Specifically, Evans-Smith asked if his wife had been raped, whether she was clothed or not, whether she had been disfigured, where she was, and who had found her.[23]

9. The defendant gave contradictory statements as to where his wife was when he last saw her, and gave contradictory statements as to whether he stopped on his way to work, claiming first that he made no stops at all, and later claiming to have stopped at the provost's office to deliver books, and finally claiming he stopped at a car wash.[24]

10. At one point he met with several friends in what the jury could infer was an effort to get them all to agree to his story about

---

[23] The Commonwealth's inference that such comments suggest guilt would perhaps be supportable if there were anything linking Evans-Smith to the crime. Otherwise, the questions seem to be perfectly reasonable ones to be expected of a bereaved husband, and it is difficult to see how they are consistent with his guilt.

[24] These inconsistencies are treated at some length in the facts section. In our view, although they received much attention at trial, the contradictions appear inconsequential, since Evans-Smith appears to have arrived at work at about the usual time.

delivering books on the morning for the killing. He even went so far as to call one person in New Mexico in what the jury could infer was an effort to get that person to say he had arrived at work on the morning of the murder earlier than he did.[25]

11. He gave contradictory statements as to the location of a mysterious van he claimed to have seen when he claimed to have driven to the bottom of his driveway to retrieve the morning newspaper. Several people who had driven the road that morning at about the time the defendant claimed to have seen the van testified that there had been no such van present. The road was a narrow, two lane dirt road on which a van would be readily seen. The defendant claimed initially that he had driven to the bottom of his driveway to get his paper, that that was when he had seen the van.

---

[25] We have searched the record in vain, paying particular attention to the passages cited by the prosecution, for support for the first sentence of the paragraph. The second is mentioned in the facts section. Once again, what is required here, in order to find for the Commonwealth, is a kind of double inference. We must infer that the content of Evans-Smith's phone conversation with someone in New Mexico was meant to make his colleague's story consistent with his own, and then we must infer that the reason he desired consistency was to create an alibi since he had committed the murder. However, the first inference might lead only to the conclusion that *whether or not* he had committed the murder, it would be in Evans-Smith's interest to present a consistent story to the police. After all, the recipient of the phone call testified that Evans-Smith simply said that it would be "nice" if the two of them had the same story. He did not appear angry, merely upset.

His daughter testified that when she arrived at the house, however, there was only one set of tire marks in the freshly raked driveway. Those tire marks would have been made by the defendant when he left to go to work.[26]

12. Dr. Byer testified that the autopsy revealed the victim died within thirty to sixty minutes of her last intake of food. The defendant told investigators that he ate breakfast with her at about 5:30 or 6:00 a.m. and that he left for work about half an hour later, at his usual time of 6:30 a.m. Coworkers testified that the defendant usually arrived at work between 7:30 and 8:00 a.m., but there was testimony that he was not at work until between 8:30 and 8:45 on the morning of the killing.[27]

13. Although the defendant had complained bitterly about traffic that morning when he spoke to others, there was testimony from several law enforcement officers that there were no unusual traffic tie-ups on the defendant's route that morning. There was no evidence adduced at trial to support the defendant's claim of unusual traffic congestion. This evidence placed the defendant

---

[26] There was testimony tending to establish the presence of the van, and a track was shown across a cultivated field, indicating the presence on the scene of an unknown party or parties.

[27] The evidence shows that Evans-Smith could have been with his wife when she was killed. Only one prosecution witness testified that Evans-Smith was regularly at work between 7:30 and 8:00, and only one (the same one) testified that he was not at his desk at 8:45 a.m.

> with the victim during virtually all of the time frame in which the medical examiner fixed her death.[28]

At the outset, it is worth noting that circumstantial evidence need not exclude every reasonable hypothesis of innocence. *Stamper v. Muncie*, 944 F.2d 170, 174 (4th Cir. 1991). Rather "circumstances altogether inconclusive, if separately considered, may, by their number and joint operation . . . be sufficient to constitute conclusive proof." *Id.* (internal quotation marks and citations omitted).

Even allowing for this important *caveat*, we believe that a rational trier of fact could not determine that the evidence supports a finding of guilt *beyond a reasonable doubt*. Instead, what the evidence shows is that Evans-Smith was at his home the morning of the murder, a fact

---

[28] The record suggests that Evans-Smith complained about the traffic, but it does not suggest that he did so "bitterly." Most of the evidence adduced at trial suggests that Evans-Smith arrived at work around 8:30 a.m. According to the medical examiner, the victim could have died anywhere from 30 to 60 minutes after she finished eating. Evans-Smith stated that he left for work after breakfast at 6:20 or 6:25, which would not have been inconsistent with his arrival time. The time of death would then have been anywhere from 7:00 to 7:30 a.m. Even assuming that he left at 7:00, and that the drive took the least amount of time it ever did, one hour and a half, the medical examiner's estimate would still allow for the victim's being killed in his absence.

We must not re-weigh the evidence, but it is worth illustrating that the victim could easily have been killed after Evans-Smith left. Indeed, the rigor mortis analysis allowed for the possibility that she was killed as late as 8:00 a.m. If she had continued breakfast after her husband's departure, the victim could have been killed at 8:00 a.m.

he does not dispute and would be his most customary behavior. In addition, according all reasonable inferences to the benefit of the prosecution,[29] we believe a rational trier of fact possibly could conclude beyond a reasonable doubt that the crime scene was staged. It is the next step – an inference that Evans-Smith was within "a state of near certitude" the perpetrator of this terrible crime – that the evidence simply cannot support.

"A determination in federal collateral review that a state court conviction by jury verdict was not supported by constitutionally sufficient evidence is one to be made with special caution and anxiety." *West v. Wright*, 931 F.2d at 270. As in *West*, the instant case requires not only the reversal of a federal district court, but also of the state trial and appellate courts.

We conclude, however, that the evidence assessed in its entirety and in the light most favorable to the prosecution is not sufficient to persuade any rational trier of fact of the petitioner's guilt beyond a reasonable doubt, that Evans-Smith's conviction on the evidence therefore violated his constitutional right to due process, and that he

---

[29] It is essential to remember that *Jackson* requires that we review *all* the evidence and then determine whether a rational trier of fact could have found guilt beyond a reasonable doubt. *See Jackson*, 443 U.S. at 319 ("*all of the evidence* is to be considered in the light most favorable to the prosecution") (emphasis in original). Favoring the prosecution with all inferences does not mean that we must ignore evidence that is in the record, but which they ignore. So, for example, as mentioned in the facts section, the unidentified hair taken from the evidence bag enclosing the victim's left hand as well as the unidentified hair from the pubic combing suggest a view of the events contrary to the one provided by the Commonwealth.

is entitled to the relief sought in this habeas corpus proceeding. Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven. To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the second. As the Supreme Court has long taught "[i]t is the duty of the Government to establish . . . guilt beyond a reasonable doubt." *In Re Winship*, 397 U.S. 358, 362 (1970) (quoting *Leland v. Oregon*, 343 U.S. 790, 802-803 (Frankfurter, J., dissenting)). Such guilt has not been established, and, as a consequence, Evans-Smith's right to due process has been violated.

We are unable to conclude that any rational trier of fact could have found Evans-Smith guilty beyond a reasonable doubt.[30] We therefore remand the proceeding to the district court with directions to issue the writ vacating Evans-Smith's conviction.

SO ORDERED

---

[30] Having found the evidence insufficient to sustain the conviction, we have no need to reach the other grounds of appeal.

VIRGINIA: IN THE CIRCUIT COURT
OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL
vs.	:	NO. 4700
WILLIAM EVANS-SMITH	:	

ORDER

For the reasons stated in the opinion letter of this Court, dated July 21, 1989, it is hereby ORDERED that the defendant's *Motion To Set Aside the Verdict* and *Motion For A New Trial Based Upon Alleged Juror Misconduct* are denied.

It is further ORDERED that the defendant's Motion to have the Pre-Sentence Report, previously prepared by the Probation and Parole Office of this Court be up-dated and the up-date forwarded to the Court forthwith.

Let a copy of this Order be forwarded to the Commonwealth's Attorney's Office, defense counsel and the Probation and Parole Office.

ENTER: 21 July 1989
/s/ James H. Chamblin
JAMES H. CHAMBLIN,
JUDGE

TWENTIETH JUDICIAL COURT
OF VIRGINIA
[LOGO]
Fauquier, Loudoun and
Rappahannock Counties

Rayner V. Snead,
Judge Retired
Carleton Penn,
Judge Retired

William Shore Robertson,
Judge
Post Office Box 985
Warrenton, Virginia 22186

Thomas D. Horne, Judge
Post Office Box 727
Leesburg, Virginia 22075

James H. Chamblin, Judge
Post Office Box 123
Leesburg, Virginia 22075

21 July 1989

William T. Burch, Esq.
Commonwealth's Attorney for Loudoun County
20 E. Market Street
Leesburg, Va. 22075

James D. Forsyth, Esq.
Deputy Commonwealth's Attorney
20 E. Market Street
Leesburg, Va. 22075

Blair D. Howard, Esq.
128 N. Pitt Street
Alexandria, Va. 22314

David H. Moyes, Esq.
23 N. King Street
Leesburg, Va. 22075

In Re: *Commonwealth of Virginia*
vs.
William Evans-Smith
Criminal No. 4700

Gentlemen:

On May 16, 1989 the defendant filed a Motion to Set Aside the Verdict rendered herein on April 27, 1989, and on May 25, 1989, the defendant filed a motion which started the process toward a motion for a new trial based on alleged juror misconduct.

For the reasons hereinafter set forth, both Motions are denied in their entirety. Each Motion is addressed below.

I. MOTION TO SET ASIDE THE VERDICT

A. Sufficiency of the Evidence

The defendant asserts that the evidence presented at trial is insufficient as a matter of law to sustain a conviction. The evidence against the defendant in this case is entirely circumstantial. Therefore, all the necessary circumstances proved must be consistent with guilt and inconsistent with innocence; they must create more than a suspicion of guilt, however strong, or even a probability of guilt; and they must exclude every reasonable theory of innocence. *Bishop v. Commonwealth*, 227 Va. 164, 169 (1984); *Stover v. Commonwealth*, 222 Va. 618, 622 (1981); *Inge v. Commonwealth*, 217 Va. 360, 366 (1976). Circumstantial evidence which is convincing is entitled to the same weight as direct evidence. *See Parks v. Commonwealth*, 221 Va. 492 (1980); *Mullis v. Commonwealth*, 3 Va. App. 564 (1987). The jury was fully instructed on these circumstantial evidence requirements. See Instruction No. 5.

The burden is on the Commonwealth to prove beyond a reasonable doubt that the defendant did murder Barbara Evans-Smith (hereinafter "Barbara" or "the victim"). The Commonwealth has the burden to prove each element of the offense beyond a reasonable doubt, viz. that the defendant killed Barbara Evans-Smith and that the killing was done with malice.

All references herein to the facts of the case as presented at trial are based on my recollection of the evidence and the transcripts that have been prepared.

No one will dispute that Barbara Evans-Smith was murdered. The defendant denies that he committed the murder. Therefore, the central issue is whether the defendant was the perpetrator of the crime. The Commonwealth had to show that the defendant was the criminal agent beyond a reasonable doubt. A long line of cases starting with *Dean's Case*, 73 Va. 912 (1879) and ending with *Brown v. Commonwealth*, 238 Va. ___, 5 VLR 2935, decided June 9, 1989, make it clear that those circumstances *which are proved* must all concur to form an unbroken chain which links the defendant to the crime beyond a reasonable doubt, and those inculpatory circumstances are motive, time, place, means and conduct. See *Cantrell v. Commonwealth*, 229 Va. 387 (1985).

If there was ever any doubt, it was resolved in *Brown* that motive is not an element of murder even in a purely circumstantial evidence case. The Virginia Supreme Court stated:

"In keeping with our decisions that motive (as distinguished from intent) is not an essential element of murder in a direct evidence case, we have never said, *and we*

now expressly disavow, that motive is an essential element of murder in a circumstantial evidence case. What we have said, and now reaffirm, is that once motive is *proved*, the underlying evidence of motive must concur with the circumstantial evidence of other inculpatory circumstances – time, place, means, and conduct – in identifying the accused as the criminal agent beyond a reasonable doubt." (emphasis mine) *Brown v. Commonwealth*, 5 VLR 2935 at 2945. Our Court of Appeals has reached a similar conclusion when it stated:

"Although the rule as to cases based entirely on circumstantial evidence is that necessary circumstances must be consistent with guilt and inconsistent with innocence, *all of the circumstances of time, place, motive, means and conduct do not have to be proved beyond a reasonable doubt in every case.* See *Cantrell v. Commonwealth*, 229 Va. 387, 398, 329 S.E. 2d 22, 29 (1985); *McGee v. Commonwealth*, 4 Va. App. 317, 322, 357 S.E. 2d 738, 740 (1987); *Mullis v. Commonwealth*, 3 Va. App. 564, 575-76, 351 S.E. 2d 919, 926 (1987). Motive, for example, need not always be proved. *Cantrell*, 229 Va. at 398, 329 S.E. 2d at 29. Therefore, the lack of evidence of motive in this case is not crucial." (emphasis mine)

Stevens v. Commonwealth, 8 Va. App. ___, 5 VLR 2439, 2444-2445, decided March 21, 1989.

The lack of evidence of motive is not crucial in this case. Sufficient evidence of the inculpatory circumstances of time, place, means and conduct was presented during the trial to justify the jury finding beyond a reasonable doubt that the crime was perpetrated by the defendant.

All the circumstances so proved did occur, and they were consistent with guilt and inconsistent with innocence.

Time and Place

The Loudoun County medical examiner testified that Barbara Evans-Smith died on April 15, 1985 at approximately 6:00 A.M. give or take two hours. The medical examiner who performed the autopsy said that she died thirty to sixty minutes after the last intake of food. Although the County medical examiner opined that her body had been placed, and had not fallen, on the floor of her bedroom in the couple's home on Route 725, there was no evidence that she had been attacked and/or died outside of the home.

Evidence of the defendant's activities that morning came from statements he made to various police officers and other persons. He and Barbara had gone to bed the night of April 14th (a Sunday). He arose at or shortly before 5:00 A.M. Although he normally walked or jogged down to get the newspaper at the box at the end of the quarter mile long gravel driveway on Route 725, he drove down in his vehicle that morning. His headlights shown upon a dark van parked on Route 725, but he saw no occupants. He and Barbara had breakfast sometime between 5:30 and 6:00 A.M. of dried peaches and toast. He left for work no later than 6:30 A.M.

The evidence conflicted as to when he arrived at work that day, but the defendant did tell investigators that he established patterns very easily. Several law enforcement officers from various jurisdictions testified to the lack of unusual traffic delays in Virginia, Maryland

and Washington, D.C. on the morning of April 15, 1985. Dorothy Lohman, a co-worker of the defendant, testified that although the defendant was often at work between 7:30 and 8:00 A.M., he was not in yet that morning at 8:45 A.M. Another co-worker, Harriet Blood, said he was there at 8:45 A.M. Other co-workers indicated he arrived, or was at the office, by 8:30 A.M.

The defendant presented no alibi evidence. His own statements placed him in the house where the murder occurred during better than one-half of the time period during which Barbara could have died. Considering death occurred within thirty to sixty minutes of eating, the defendant's own statements of when they ate breakfast placed him there during most, if not all, of that time period.

Means

Although he may have been in his sixties, the defendant was in good physical shape. Deputies Gibson and Wright both testified that the defendant was a strong person as a result of their observations of him during the altercation at the end of the driveway on the day of the crime when the defendant wanted to see his wife's body, but was denied. The autopsy showed that Barbara Evans-Smith was 5'3" tall and weighed 145 pounds. The jury observed the defendant during the trial both sitting and standing. He had the size and the strength to strangle his wife, especially if she was surprised by the attack. It is more likely that someone she knew rather than a stranger could have gotten close enough to her to attack her by surprise.

The cause of death was strangulation by ligature. A pair of pantyhose was found wrapped around Barbara's neck. Clearly the pantyhose was the instrument of death. Another pair of pantyhose was found on the dresser near where Barbara was found lying dead. It can be inferred that the pantyhose used to strangle her was easily accessible and available to the defendant.

Conduct

The evidence of the conduct of the defendant during the time that death occurred has been outlined above. However, conduct of an accused following a crime is just as relevant in most cases as conduct before, particularly when its purpose is to conceal guilt. *See Pearson v. Commonwealth*, 221 Va. 936 (1981).

When informed of his wife's death by Investigators Brown and Merchant on the afternoon of April 15, 1985, the defendant's initial questions could be considered inconsistent with one who had been completely surprised at learning of his wife's unexpected death. At that time the defendant gave a different location for the dark van on Route 725 than he did when interviewed by Investigators Brown and Merchant on Wednesday, April 17, 1985. He made varying statements to different persons as to where Barbara was standing when she waived good-bye to him to morning as he left for work. There was evidence that he met with and/or spoke to friends and co-workers after the date of the offense in an effort to get them to all ascertain exactly when he arrived at work that morning. He told some persons he made no stops on the way to

work, yet he told Ms. Tandler in January 1986 that he had stopped at a car wash on the way to work.

The defendant told the investigators that he had worked on the farm all day the prior Saturday during which he cleared locust bushes. He and Barbara went to the Point to Point races at Oatlands the next day. Witnesses differed on whether they saw scratches, cuts or bandages on the defendant's hand or hands at that time. Two officers noticed stratches [sic] on the defendant's hands while he waited at the gate to his farm while the police investigation was taking place. A photograph of the defendant's arm taken on April 17, 1985, showed scratches that at least one doctor opined were caused by human fingernails. At the end of the driveway on the day of the offense the defendant demanded to see his wife's body, yet when he had the opportunity at the funeral home two days later he did not ask to see the body.

Two blood stains consistent with the blood of the defendant were found on Barbara's robe. Hairs with the same characteristics as that of the defendant were found near the right hand of the victim, from her pubic area and on the clothing she had on when found. Blood consistent with the defendant's was found on facial tissue in the waste basket of his bedroom.

Blood consistent with the victim's was found on at least five places on her robe. Blood stained or tinged fluid was found in the victim's ear which Dr. Beyer said came from her lungs through her mouth and into the ear as she lay on the floor. The gag which had blood on it was placed in the mouth after the initial discharge. Such fluid was discharged at anytime during or after the attack. It

could, therefore, be the source of the blood on the victim's robe. More than one witness testified that Barbara kept an immaculate house. The photographs of the bedroom of the defendant indicate that he is a neat and organized person.

Shortly after the offense the defendant on several occasions told police officers that a green or aqua colored jewel box was missing. When talking to Joe Rogers, Jr. who had been, and still was, renting a field at the Evan-Smith's farm in the latter part of April 1985, the defendant asked that if he saw anything unusual to report it. On May 1, 1985, George Schooley, Jr., while disking the field, found the jewelry box. It was admitted into evidence, was observed by the jury and, other than being somewhat dented by being under the seat of Schooley's tractor, it showed remarkably little wear after being recovered approximately two weeks after the offense.

The defendant attempted to show that Barbara had been killed by other persons during what appeared to be a rape and robbery. The Commonwealth contended that the scene had been staged by the defendant. The medical examiner on the scene testified that the body of the victim had been placed, and had not fallen, where it was found. The autopsy revealed no signs of a sexual assault. No seminal fluid was found at the scene, on the victim or on her clothes. Investigator Merchant testified that he examined the exterior of the house and found no signs of a forced entry. At the foot of the stairs leading to the second floor (the body was found in a second floor bedroom) a table was found knocked over, but resting on a drawer that was in it, resting on top of the indentations of the legs in the carpet and with an arrangement of dried

flowers that was on it lying on its side, but with little or no debris on the carpet from the flowers. It appeared that the table drawer and flower arrangement had been placed, and not fallen or knocked over, where they were found.

It was raining or misting that morning. The Evans-Smith home was neat and well kept. The photographs of the interior of the house showed it to be very orderly and clean. Yet there was no blood found except on the victim's clothes, the ligature and in the aforesaid waste basket. No dirt or mud was found tracked into the house, even in the areas leading from the unlocked kitchen door to the victim's bedroom where her body was found. One of the dogs was penned up in the laundry room, and Lesleigh Cook, daughter of the defendant and the victim, testified that she had never seen that done before. The other dog was outside. THe one penned up was especially found [sic] of Barbara.

The Commonwealth contended that Barbara was killed downstairs at the kitchen table and drug upstairs to the bedroom where the scene was staged. The table and hutch in the kitchen area were found slightly off center, and drag marks were found on the linoleum of the kitchen floor consistent with the marks that could be made by dragging two feet. One of Barbara's slippers was found on the floor in or near the kitchen, and the other near the table at the foot of the stairs. Dr. Beyer testified that his autopsy revealed that Barbara had deep hemotoma to the back of the head caused by blunt force trauma which could have resulted from her head hitting a step when being drug up the stairs. Hairs consistent with Barbara's were found on the stairs. There were no hairs

found that were not consistent with the hairs of the defendant or the victim and which had been forcibly removed. Other hairs not consistent with either the defendant or the victim were found, but none of them appeared to have been forcibly removed.

Early on the defendant was asked by the officers to provide a list of the items missing, but he complained that he could not do so until he had a list of what had been taken during the investigation. The evidence was not exactly clear and definite on what the defendant told the officers at various times about what he felt was missing. The jewelry boxes and jewelry scattered on the defendant's bed was almost uniformly arranged, and did not appear to have been placed by an unknown intruder in a hurry.

The defendant attempted to show that one, or possibly two, horse trainers with connections to an adjacent farm could have been the assailants. The evidence as to when the two trainers, Robert Rivera and Rudy Ruiz, were at the adjacent farm (Grassy Mead Farm) that morning was conflicting. Mr. Rivera testified he was there only about forty minutes, arriving about 6:15 to 6:20 A.M. and leaving a little after 7:00 A.M. His wife, who was living with him in Charles Town, West Virginia at the time corroborated his testimony. They were divorced at the time of the trial. A private investigator hired by the defendant testified that Rivera had told him that he had arrived at 8:00 A.M. and was there about 15 minutes. The same investigator testified that Rivera told him he was broke, but Rivera and his wife testified at trial that they had no money problems at that time even though he had

been "ruled off" the Charles Town, West Virginia racetrack where he had been training horses. The jury was properly instructed that evidence of a prior inconsistent statement only bears on a witness' credibility.

Rivera testified that he and Ruiz came to Grassy Mead that day to pick up a horse and take him to the track in Charles Town to work him. Even though there are security guards at the gate to the track who are required to log in each horse carrier, there was no written record of Ruiz or Rivera or the specific horse coming into the track that morning. However, Mrs. Rivera, who had plenty of knowledge of the track, testified that it was not unusual for the guards not to make a record of every horse carrier that came into the track, especially if they were known to the guard.

There is a lack of any physical evidence to show that Rivera or Ruiz, horse trainers, who are outside and handling horses everyday, were ever in the Evans-Smith home. There was no evidence that Barbara was attacked or died outside of the house. There was no evidence to link the extraneous hairs found in the house to either Rivera or Ruiz.

There was no evidence that the vehicle Rivera and Ruiz used that day was a van or similar to what the defendant said he saw on Route 725 that morning. Rivera testified that he was driving a Chevrolet Club Cab Long Truck, which is not a van in appearance. His wife said it was a pick up truck with a gooseneck trailer, and that neither he nor any of his acquaintances had a van.

The defendant presented the testimony of Tracy Dillon about a van with Louisiana tags that pulled in front of

her and failed to let her pass on Route 690 sometime after about 8:25 A.M. that morning. This occurred five to six miles and about ten minutes away from the Evans-Smith farm. It accurred [sic] on a road that was not the most direct route between the farm and Charles Town.

The Commonwealth presented a series of witnesses who drove on Route 725 that morning before and after the time that the defendant said he saw the van. None of the witness [sic] said they saw a van. The meteorological evidence indicated that the time of sunrise on that morning was about 5:32 to 5:34 A.M. A neighbor testified he went down his driveway at 6:15 A.M., and he had turned on his headlights. There was conflicting evidence concerning the tire tracks in the driveway. However, considering all the meteorological evidence, it could be concluded that the defendant only made one trip down the driveway that morning in his vehicle, and that was when he left to go to work. Evidence of one set of tire tracks was presented, and the defendant could have had his lights on when he left to go to work.

The jury observed the witnesses and all the proceedings before it in the case. The jury is the judge of the credibility of the witnesses. The jury went over all the numerous exhibits admitted into evidence. Having heard and seen all the evidence, I am of the opinion that there was sufficient evidence presented for the jury to find under the instructions given that the defendant did murder Barbara Evans-Smith.

B. Denial of Motion for Change of Venue

I am still of the opinion that I was correct in denying the motion for change of venue for the reasons stated from the bench on December 14, 1987. I do not feel that any of the proceedings in this case between then and now are sufficient grounds to reverse my decision. Considering the prior history of this case, I do not feel that it took an inordinate amount of time to empanel a jury. For reasons stated below, a fair an [sic] impartial jury was empanelled for the trial of this case.

C. Motion Pursuant to Section 19.2-243 of the Code of Virginia

The Court's ruling on this motion will remain the same. I feel the motion was properly denied for the reasons set forth in my opinion letter of March 24, 1989.

D. Evidence of Drug Trafficking and Conspiracy Charges of Robert Rivera

The defendant asserts that the Court erred in not allowing him to introduce evidence at trial that Robert Rivera had been convicted of a felony drug offense in federal court in Texas and of his drug related activities in that case. The defendant contends that such evidence was needed to identify Rivera as a possible third party criminal agent who remained uninvestigated by the police and who was shown to be connected to the crime by a series of circumstantial facts of probative value equal to or greater than those composed against the defendant by the Commonwealth.

Rivera was called as a witness for the defendant. Under Section 8.01-403 a party calling a witness cannot impeach his credit by general evidence of bad character, but if the witness proves adverse, then with leave of Court it may be shown that the witness made prior inconsistent statements. Evidence of criminal conviction or wrongdoing is most always offered to affect a witness' credibility. That is not the case here. This evidence was offered to implicate Rivera as the possible perpetrator, and, incidentally, to show an incomplete investigation by the police. Specifically, it was offered to show motive on Rivera's part; and, therefore, he should have been investigated sooner by the police.

The evidence admitted at trial that purports to implicate Rivera is that he was at an adjacent farm the morning of the offense with a person he had brought to Virginia from Louisiana, and that a van with Louisiana tags was seen approximately five miles from the Evans-Smith farm that morning sometime after 8:25 A.M. The evidence against Rivera is not very convincing. Evidence of his conviction would show nothing other than that he is of bad character and is a person likely to commit a crime. If Rivera had been on trial, then the Commonwealth could not have used such evidence against him except to impeach his credibility if he takes the stand. I cannot agree that the circumstantial evidence against Rivera is equal to or greater than the circumstantial evidence against the defendant.

The defendant cites *Hines v. Commonwealth,* 136 Va. 728 (1923) and *Karnes v. Commonwealth,* 125 Va. 758 (1919) as authority for allowing such evidence. In both of those cases there was some connection between the victim and

the alleged third party. Here there was no evidence of any drug involvement by the victim. There was no evidence that Rivera may have been aware that money or valuables were in the Evans-Smith house. The evidence at trial from Rivera and his wife at the time of the offense was a lack of any money problems. Any prior inconsistent statements only affect credibility, and are not evidence of the truth of what was said. Even if one does not believe Rivera and his then wife, it would be sheer speculation of the extent, or even the existence, of a money problem.

The defendant argues that he should have been permitted to introduce evidence of the conviction to show an inadequacy in the police investigation. A deficient investigation may result in a lack of sufficient evidence or inadmissible evidence, but I do not feel that a deficient investigation is a defense to a crime so as to allow the defendant to have admitted in evidence all the information that the police had or should have known during the investigation. Such evidence must be admissible under the rules of evidence.

The conviction evidence (which includes evidence of the charge, the conviction and the statements made at sentencing) was not probative of motive to kill Barbara Evans-Smith. Its prejudicial effect on the Commonwealth outweighed any probative value it may have had for the defendant. Just because a certain fact may have been known to the police does not make it automatically admissible in evidence.

The defendant now argues that he should have been allowed to introduce evidence of a Loudoun investigator's help to Rivera when he was sentenced on the drug

charge because it shows bias. Even if it were deemed that Rivera proved adverse, the defendant cannot attack his character or reputation for truthfulness by a prior conviction. See *Friend,* Law of Evidence in Virginia (3d Ed. 1988). It would have been necessary to show the conviction in order to show the bias.

For all the foregoing reasons, the evidence of Rivera's conviction and related circumstances was not allowed in evidence. I am of the opinion that the ruling at trial was correct.

E. Improper Argument and Conduct by the Commonwealth's Attorney

1. Improper Argument in Closing and Rebuttal

All of the statements in closing argument by the Commonwealth's Attorney concerning the travelers on Route 725 that morning, the house being kept locked by Barbara Evans-Smith and her waiving good-bye to the defendant from the bedroom window were not misrepresentations, misstatements or extravagant claims as asserted by the defendant. Each was a fair and proper argument by the Commonwealth's Attorney.

His statement that the blonde hair found on the steps "had fallen there" was completely consistent with the testimony of Deanna Dabbs, a forensic scientist, that the hair "was consistent with having fallen out."

The Commonwealth's Attorney stated in rebuttal that there was one head hair found in the pubic combings of the victim that had been forcibly removed and it was consistent with the defendant's hair. The only testimony

concerning scientific analysis of hairs was that of Ms. Dabbs. She did not testify that any hair consistent with the defendant's hair was found in the pubic combings. Despite the defendant's argument in his memorandum (see page 24 thereof) about defense counsel's vehement objection to the "forcibly removed" comment, the matter of most concern to defense counsel at the bench conference after the objection was made was the reference to hair found in the pubic combings. Defense counsel did not ask for a mistrial or a curative instruction. After the bench conference the Commonwealth's Attorney told the jury that the head hair was found in the pubic area, and he correctly stated that it was the joint recollection of jurors that controls. The transcript of the bench conference is not complete, but it is my distinct recollection that defense counsel did not object to the Court's suggestion that the Commonwealth's Attorney correct his statements. There was no further objection made even though no mention was made by the Commonwealth's Attorney after the bench conference as to the "forcibly removed" statement he had previously made.

The defendant's allegations concerning statements made about blood found on the victim's "throat" are now moot because the transcript has been corrected to show that the Commonwealth's Attorney said "robe", and not "throat".

2. Statements in Opening Concerning Evidence Never Admitted During Trial

The Commonwealth's Attorney made statements in his opening concerning an alleged extramarital affair of

the defendant and some guns of the defendant. Evidence on both of these subjects was not admitted during trial.

The jury was instructed by the Court prior to opening statements that it was their duty to determine the facts from the evidence and all reasonable inferences therefrom, and that what the attorneys may say is not evidence. The jury is to follow the instructions of the Court, and it must be assumed that they do so.

Considering the vast amount of evidence presented during the trial, I fail to see how the defendant might have been prejudiced by the statements concerning the guns. As to the statements in opening about the extramarital affair, defense counsel quite pointedly brought it to the attention of the jury, in closing argument, when he emphasized the lack of evidence as to the alleged affair. It was used to show weakness in the Commonwealth's case. At no time did defense counsel request a cautionary instruction.

When the statements were made in opening the Commonwealth's Attorney had reason to believe that such evidence would be admissible because it was admitted at the first trial without objection by the defendant. The evidence was objected to by the defendant in this trial. Considering how the case was tried by defense counsel, I cannot find that such statements prejudiced the defendant to the extent that a new trial should be awarded.

3. Failure to Properly Instruct Witnesses Not to Communicate with other Witnesses or Mention the Prior Trial

The matters of communication by Commonwealth witnesses with other witnesses were thoroughly inquired into by the Court when brought to its attention during trial. With respect to Sheriff Isom, after an *in camera* proceeding, the Court admonished him not to discuss the case with anyone else until it was concluded. Defense counsel agreed with the admonishment and did not object further or request any further sanctions or relief. As to Investigator Brown, the Court, after a hearing in open Court, similarly admonished him after finding that he had not discussed the case with other witnesses. Again, there was no further objection or request for further relief from defense counsel.

Sheriff Isom did testify on cross-examination that he had "been through this Court case one time." Counsel was instructed prior to trial to tell all witnesses to refer to the prior trial as a prior hearing. The Court wished to avoid having the jury hear the word "trial", but it is certainly reasonable to assume that most, if not all, of the jurors had a pretty good idea by the time that Sheriff Isom testified that this case had previously been in Court for some reason. Both the Commonwealth's Attorney and defense counsel had been utilizing transcripts from the prior trial while at the podium in questioning witnesses. The jurors were not close enough to read the transcripts, but were close enough to tell that they were transcripts. Sheriff Isom did not say "trial." The answer he was giving was responsive to the question posed by defense

counsel. I cannot find that Sheriff Isom deliberately inserted the comment. Given the four years between the date of the offense and the time of trial, a juror could certainly believe that the Sheriff had to have been involved in some prior Court proceeding. Further, the numerous references to "prior hearing" during the trial in response to questions by *both* the Commonwealth's Attorney and defense counsel diluted the effect of the Sheriff's comment. I cannot see that much difference between his comment and "prior hearing" used by other witnesses and counsel.

The rule on exclusion of witnesses was not violated by the conduct of Sheriff Isom or Investigator Brown. The purpose of the rule is to prevent a later witness from shaping his testimony to correspond to earlier testimony in the case. The rule is aimed at the witness who has not yet testified. Sheriff Isom and Investigator Brown had already testified when their alleged improprieties occurred. They were not called to testify thereafter. See *Friend, supra,* Section 13.

All of the alleged misconduct by the Commonwealth's Attorney does not warrant the granting of a new trial.

F. Failure to Grant Mistrial During Testimony of Sheriff Isom

For the reasons set forth above, I am of the opinion that there was no error in failing to grant a mistrial because of Sheriff Isom's comments about having "been through this Court case one time."

The defendant also contends that the comment of Sheriff Isom and the necessity for repeated references to the prior proceedings and transcripts had the effect of prejudicing the defendant by informing the jury of a prior trial or causing them to infer an attempt to conceal information from the jury. I do not agree. Defense counsel engaged in numerous references to what a witness said at the "prior hearing". Defense counsel did not express any concern to the Court before or during trial about repeated references to a "prior hearing". Both the Commonwealth and defense counsel knew that each side would utilize the transcript of the prior trial if a witness testified differently than at the prior trial. If there was any prejudice to the defendant by such references to the proceedings, then there was also prejudice to the Commonwealth, and both the Commonwealth and the defense engaged in the same conduct. The defendant cannot complain of prejudice resulting from a trial tactic which he also utilized.

G. Conclusion

For all the reasons set forth above, the Motion to Set Aside the Verdict is denied in its entirety.

II. MOTION FOR A NEW TRIAL BASED UPON ALLEGED JUROR MISCONDUCT

On May 25, 1989, the defendant filed a motion requesting the Court to investigate the responses given to *voir dire* questions by three jury panel members. Attached to the motion were affidavits of two defense-employed private investigators, Robert Puglisi and M. Morgan

Cherry, concerning interviews with jurors Paul Michael, Judith Davis and Robin Grimm conducted after the completion of the trial. Based on the affidavits, which raised the possibility of juror misconduct, the Court granted the motion and conducted a hearing on June 13, 1989, at which time the three jurors and Mr. Puglisi testified. After the presentation of the evidence and argument of counsel, the defendant moved the Court for a new trial based on alleged juror misconduct.

The following findings are made based upon the evidence presented at the hearing. The affidavits served only as a basis for determining that a hearing should be held. Any statement of a juror made to a private investigator was received as either a prior consistent or inconsistent statement affecting the juror's credibility. Also, I must consider that the private investigators were retained by the defense and approached each juror unannounced with a definite purpose. Although, the interviews were admittedly taped by the private investigators, no transcripts or the recordings themselves were offered by the defendant. Also, I cannot ignore the admonition given in adultery cases that the testimony of private investigators should be received with great caution. I feel the same should apply where a defendant is attacking the sanctity of a jury verdict.

A. Juror Paul Michael

During *voir dire* Mr. Michael stated that he had not acquired any information about the alleged offense or the defendant from the news media or any other source. When asked if he had heard of the case from newspaper

reports, television reports or discussion of friends, he replied, "I don't believe so, no." He said he was sensible of any bias or prejudice against the Commonwealth or the defendant. Defense counsel stated at the end of *voir dire* of Mr. Michael, "(w)e have no issue with this gentleman," and he was not challenged for cause by the defendant.

As the evidence was presented during the trial Mr. Michael remembered that there had been a murder in Loudoun County and someone had killed his or her spouse. He did not remember the details. He had no independent recollection of a murder in Loudoun County or that someone killed his or her spouse at the time he answered the *voir dire* questions. At the hearing he stated "I honestly did not know anything about this case," and when asked by the Commonwealth's Attorney if there was anything he remembered during the trial that would have affected his ability to sit fairly and impartially, he responded, "No, sir. I went solely on the evidence and testimony, and that's it."

In his affidavit and during his testimony Mr. Puglisi said that when he asked Mr. Michael how he could equate what he had heard before the trial with what he heard in the courtroom, he responded that "it was the strangulation thing." At the hearing Mr. Michael said he did not remember saying this, but he did not deny it either.

Mr. Michael did not inform the Court or counsel during the trial of what he had remembered.

B. Juror Judith Davis

During *voir dire* Ms. Davis answered in response to the Court's question as to her acquisition of any information about the offense or the defendant: "Only from what I've read in the paper and that was quite sometime ago." She said that the information would not affect her impartiality, and she had not arrived at any opinions or conclusions with respect to this case. When questioned by defense counsel as to her prior knowledge, she stated that

1. she read it in the Loudoun Times-Mirror;
2. the details were "very sketchy at best";
3. she remembered as to the details only "something about his occupation" and "about some place downtown."

She had no other recollection of any other details or any prior proceedings. Ms. Davis was not challenged by the defendant on the basis of her prior knowledge.

Based on her testimony at the hearing, Ms. Davis did know during *voir dire* that the defendant was "employed downtown" and that "his wife had been murdered." As the evidence was presented during the trial, she remembered more about what she had read but she cannot remember exactly what she had read. She could say only definitely that she'd read something before about strangulation by pantyhose. She was not sure of having read before about the tire tracks, Robert Rivera or the extramarital affair. Ms. Davis did not inform the Court or counsel that she recalled certain things during the course of the trial.

At the hearing Ms. Davis identified an April 1985 Loudoun Times-Mirror article that she thought she had read.

Ms. Davis said that there was nothing that she remembered during the course of the trial that she may have read before that would have affected her ability to sit fairly and impartially as a juror in this case.

In his affidavit and testimony at the hearing Mr. Puglisi said that when he asked Ms. Davis if any of the jurors had been exposed to news, television or may have had something in the back of their minds concerning the case, she said "well, I could be one of those." But she said unequivocally at the hearing that she was merely referring to what she knew at *voir dire* and the answers she gave to the questions posed to her at the time. She knew it was a retrial because of the numerous references to prior testimony and proceedings during the trial, but she did not know that the defendant had been previously convicted until after this trial was concluded.

In answer to a question by defense counsel at the hearing Ms. Davis may have seemed to indicate that there were things she read or heard about the case before she sat as a juror but which were not presented in the Courtroom, but defense counsel did not pursue this issue. However, her answers to further questions by the Court on the subject show that she was only thinking of the extramarital affair and that it was first mentioned to her by a co-worker after the conclusion of the trial. She said that she was not aware of the extramarital affair until after the trial. The jurors may have wondered why Ms. Bunge was recognized by the Court as a witness, but did

not testify, but there was nothing presented to indicate that any of the jurors associated her with the extramarital affair.

As an aside from matters pertaining specifically to Ms. Davis, it must be noted that during trial just after the Court made its ruling excluding testimony of the extramarital affair, the Commonwealth asked the Court to recognize Ms. Bunge because the Commonwealth's out of state witness certification for her had or was about to expire. The Court specifically asked defense counsel if they wished this to be done outside of the presence of the jury. In response, defense counsel did not object to it being done in the presence of the jury.

C. Juror Robin Grimm

During *voir dire* Ms. Grimm was asked by the Court, "(h)ave you or any member of your family ever been engaged in law enforcement work?" She answered, "No, sir." She stated that she served in the Army for three years attaining the rank of E-4 when she was discharged.

While she was in the Army, Ms. Grimm had been an "administrative specialist" in the Criminal Investigations Division (CID) at Fort Meade. Her description of the job was that she was basically a secretary, a driver for generals, a mail clerk, a word processor and that she mowed grass. She was not involved in any criminal investigations, she did not assign investigators and she had no military police training. She never discussed a case with an investigator. Being the mail clerk she had to open envelopes to see that the contents went to the correct person. She only saw criminal evidence as it came

through the mail room, and then only to see that it went to the correct place. She only saw final investigation packages, and never was involved in any on-going investigation.

During *voir dire* it did not occur to Ms. Grimm at all that her duties at CID had anything to do with the question concerning law enforcement work. She was, in her own words, "just a clerk, just, you know, more or less a secretary and a catch all, I didn't really think that was very important."

Ms. Grimm did not bring her duties at CID to the attention of the Court or counsel during the trial. She stated that there was nothing in her prior military training or service that would have affected her ability to sit fairly and impartially as a juror in this case.

There was no evidence presented at the hearing that indicated in any way that any of the three jurors told the other jurors of their prior knowledge, except that Ms. Grimm might have told one or more jurors that she "was military." None of the three jurors indicated that the jury had considered or heard any evidence or information outside of what was presented during the trial.

When asked on *voir dire* if any of the three aforesaid jurors knew any reason whatsoever why they could not give the defendant a fair and impartial trail based solely on the law and the evidence, they all responded in the negative.

D. Application of Law and Conclusions

Certainly a defendant in a criminal case is entitled to be tried by an impartial jury. U.S. Const. Amends. VI and XIV; Virginia Const. Art. I, Section 8. However, at the same time it is virtually impossible to have a juror that is shielded from every influence or contact that might affect his decision. Due process means a jury capable and willing to decide the case solely on the evidence before it coupled with a trial judge preventing prejudicial occurrences and to determine the effect of such occurences if and when they happen. *Smith v. Phillips*, 102 S. Ct. 940, 946 (1982). *Voir dire* as a safeguard for jury impartiality is not infallible, and, at the same time, due process does not require a new trial everytime a juror is placed in a potentially compromising situation. *Id.* at 946. If that were the rule, few trials would be constitutionally acceptable. It is a time-honored maxim that a defendant is entitled to a fair trial, not a perfect one for there are no perfect trials. *McDonough Power Equipment, Inc. v. Greenwood*, 104 S. Ct. 845, 848 (1984); *Brown v. United States*, 93 S. Ct. 1565, 1570 (1973). Nor is a defendant entitled to a panel of jurors who are wholly ignorant of the case. *Irvin v. Dowd*, 81 S. Ct. 1639 (1961); *Raulerson v. Wainwright*, 753 F. 2d 869 (11th Cir. 1985); *Justus v. Commonwealth*, 220 Va. 971 (1980). *Also, see L.E. Briley v. Commonwealth*, 222 Va. 180 (1981).

I cannot agree with the defendant's contention that it is not necessary to show bias or prejudice resulting from the non-disclosure or concealment by the juror. I cannot agree that the juror disclosure required in Section 8.01-358 gives the defendant a new trial automatically if a

juror concealed information. The statute in my opinion applies to a juror who actually knows something as opposed to a juror who has heard or read or been told something about the case. Except for the District of Columbia cases and, possible, one California case cited by the defendant, all cases cited by counsel show that there must be some connection between the concealment or other juror impropriety and the juror bias or prejudice.

In *Smith* the U.S. Supreme Court stated:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.

102 S. Ct. at 945.

In *McDonough* the same Court stated:

> The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

104 S. Ct. at 850.

I feel that this is a similar standard to that set forth by our Court of Appeals in this case, when it stated:

> The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced.

5 Va. App. at 207.

In other words, it is not a *per se* test, but a test of reasonableness. The Court of Appeals explained how the

almanac information in the first trial might have prejudiced the jurors. It did not rule that just because a juror consulted an almanac and shared the information with the other members of the jury, the defendant is automatically entitled to a new trial. The reasonable possibility of prejudice had to be shown.

In *Briley* the Virginia Supreme Court, following *Irvin v. Dowd,* held that the mere existence of any preconceived notion as to guilt or innocence without more is insufficient to rebut the presumption of a prospective juror's impartiality. It is sufficient if a juror can set aside his impression and render a verdict based on the evidence presented in Court. 222 Va. at 186. Also, in *Mullis v. Commonwealth,* 3 Va. App. 564 (1987) the Virginia Court of Appeals held that whether a juror should be excused for cause should be decided upon a review of the entire *voir dire* and not just on the answer to one isolated abstract question of whether a juror would tend to believe a police officer as opposed to a private citizen. 3 Va. App. at 572.

Although counsel has not cited and I have not found a Virginia case directly on point, I am of the opinion that in light of the two Virginia cases referred to above and the Virginia Supreme Court decision in *Clozza v. Commonwealth,* 228 Va. 124 (1984) bias or prejudice must be shown in order to entitle the defendant to a new trial.

> A prospective juror is not subject to automatic exclusion because of an association with law enforcement personnel, provided the juror has no knowledge of the facts of the case and *demonstrates impartiality* toward the parties. (emphasis mine)

228 Va. at 129.

Assuming that the concealment does not constitute grounds for challenge for cause, the failure to accurately answer a *voir dire* question does not deprive the defendant of information needed to exercise his peremptory challenges. *United States v. Fryar,* 867 F. 2d 850 (5th Cir. 1989)

Although there may be jurisdiction to the contrary, I am of the opinion that the majority and better view is that there must be some nexus between the concealment or impropriety of the juror and the juror bias or prejudice against the defendant. The Virginia Supreme Court has recognized that the decision of the trial judge who had the opportunity to observe the prospective jurors on *voir dire* is entitled to much deference. *Smith v. Commonwealth,* 219 Va. 455, 464-465 (1978). The same should apply to a hearing on alleged juror misconduct. With these principles in mind, I will address the circumstances involved with each juror.

1. Juror Paul Michael

At most Mr. Michael recalled for the first time during the trial that sometime prior to the trial he had acquired information that there had been a murder in Loudoun County and someone had killed his or her spouse. The former was an undisputed fact at trial, and the latter was not connected to the defendant by Mr. Michael. He recalled no other details of the case. He did not even say that what he remembered was specifically applicable to this case. He didn't even know what spouse had done the killing. Mr. Michael honestly did not recall anything at all

about the case during *voir dire*. The little that he remembered during the trial does not tend to show any partiality on his part. His reason for his answers on *voir dire* were honest. He just did not remember at that time.

Mr. Michael's recollections during the trial are very general and nebulous. His recollections may not have even had anything to do with this case. The jury was instructed to decide the case based on the law and the evidence. Jurors are presumed to follow the instructions of the Court. See *Raulerson*, 753 F. 2d at 876.

A mere showing of the possibility of prejudice is not enough. *United States v. Barber*, 668 F. 2d 778 (4th Cir. 1982).

I cannot find that Mr. Michael, based on what he remembered during the trial, was biased or prejudiced against that defendant, and I cannot find that his decision as a juror was based on anything other than the evidence presented at the trial.

2. Juror Judith Davis

Considering all the evidence presented, I cannot find that Ms. Davis knew any more during the course of the trial than she revealed on *voir dire*. She may have recognized the *Times-Mirror* article at the hearing, but that does not prove that she had all the information set forth therein in her mind as she sat as a juror. It's common knowledge that human beings do not remember all that they read. The possibility of her remembering it is not enough. I am constrained to believe what Ms. Davis testified to under oath.

It's obvious to the Court that Ms. Davis read and discussed this case after the trial was concluded. She was not definite in stating when she read and/or discussed the extramarital affair, the tire tracks, Robert Rivera or the pantyhose. It is most telling that when asked what things she read or heard before that did not come out during the trial, all she mentioned was the extramarital affair, but when she was pursued on the point by the Court, she admitted that it came up after trial. She specifically denied any knowledge of the extramarital affair during the trial.

The defendant argues that if Ms. Davis had answered on *voir dire* as she did at the hearing, then she would have been excused for cause. This is an inappropriate argument because at *voir dire* she had not yet heard the evidence and was not shown the newspaper article. Defense counsel was not in any way prevented by the Court from exploring the extent of Ms. Davis' knowledge at *voir dire*. Further, it would have been objectionable to have shown Ms. Davis the newspaper article on *voir dire*.

Even if Ms. Davis did remember something about the tire tracks, Robert Rivera or the pantyhose during the trial, the defendant did not elicit from her the details of each subject. There was evidence presented on all three subjects at trial. If what she remembered is the same as the evidence at trial, then how is the defendant prejudiced? Likewise, to find that the specifics were different would be sheer speculation. Possibility or prejudice is not enough. The sanctity of a jury verdict should not be attacked and the verdict set aside on speculation or possibility of prejudice.

Ms. Davis answered the *voir dire* questions honestly. While there may be some impropriety on her part in not coming forward during the trial to indicate what she started to remember, I cannot find her decision to he dishonest or an indication of her bias or prejudice against the defendant. There is nothing to support a finding that her decision as a juror was based on any evidence or information outside that presented in the Courtroom.

3. Juror Robin Grimm

The language of the question posed to Ms. Grimm on *voir dire* concerning law enforcement work was developed by and requested by the defendant. The crucial words are "engaged in law enforcement work." As Ms. Grimm explained her duties while with CID in the Army, she could easily and reasonably felt that she was not engaged in law enforcement work. As asked, she could have reasonably felt that it only applied to a person actually enforcing the law, such as a military policeman or investigator, or someone with arrest or investigatory duties and powers. She did not have arrest powers or investigative duties. She was merely a secretary, clerk, driver and performer of odd jobs. She was not asked if she was ever "involved with," "associated with" or "employed by" law enforcement. A juror can't be expected to answer a question not posed to him or her. Further I feel that this situation is very close to that found in *Clozza*. Her CID duties would not have given rise to a challenge for cause. There has been no showing whatsoever that Ms. Grimm was aware of any of the facts of the case or that she was not impartial.

As it was asked, Ms. Grimm answered the question fairly and honestly. If the question is entitled to more than one reasonable interpretation, then it is not grounds for a new trial just because the juror interpreted the question different from defense counsel. *See United States v. Fryar,* 867 F. 2d 850 (5th Cir. 1989) where a new trial was denied even though a juror concealed a DWI conviction when asked if he had ever been convicted of a crime. Just as that juror felt DWI was not a crime, Ms. Grimm felt that she was not engaged in law enforcement work.

No bias or prejudice has been shown on the part of Ms. Grimm. I cannot find that her duties while in the Army with CID made her biased or prejudice against the defendant.

All three jurors stated specifically at the hearing that there was nothing that any of them had read or heard or experienced before the trial that affected their impartiality. There was no showing of any improper motive for concealment by any of the three jurors. While there may be some dispute that "inferred bias" or "implied bias" can exist regardless of what the juror or other evidence may say about a juror's impartiality, I feel that such bias could exist in an appropriate case. For example, see Justice O'Connor's concurring opinion in *Smith,* 102 S. Ct. at 948. Considering those examples, I am of the opinion that none of the alleged improprieties by the three jurors in this case rises to the level of "inferred" or "implied bias."

For all the foregoing reasons, the motion for a new trial based on juror misconduct is denied. Further, I am of the opinion that the defendant received a fair trial in this case.

The Clerk will prepare an order consistent herewith.

Mr. Muse will contact counsel to set a date for sentencing as soon as possible.

Very truly yours,

/s/ James H. Chamblin
James H. Chamblin, Judge

VIRGINIA: IN THE CIRCUIT COURT OF LOUDOUN COUNTY

COMMONWEALTH OF VIRGINIA	:	CRIMINAL NO. 4700
vs.	:	
WILLIAM EVANS-SMITH	:	

ORDER

The 11th day of August, 1989, came William T. Burch, the Attorney for the Commonwealth, and James D. Forsyth, Deputy Attorney for the Commonwealth, and also came the defendant, WILLIAM EVANS-SMITH, who stands convicted of a felony, to-wit: second degree murder, and who came to the bar of this Court in the custody of a deputy sheriff, and also came Blair R. Howard and David H. Moyes, counsel for the defendant herein.

And Margaret A. Morgiewicz, Chief Probation and Parole Officer of this Court, appeared in open Court with a written report, originally prepared by S. Dean Hahn, a Probation and Parole Officer of this Court in 1986, together with a written addendum updating said report prepared by Ms. Morgiewicz on July 27, 1989. Copies of both the report and the addendum had been filed with the Court, the Attorney for the Commonwealth, and defense counsel more than five (5) days prior to this hearing date. A formal reading of the said report and its addendum was waived by all counsel as well as cross-examination of the said Probation Officer. With the consent of the Commonwealth, defense counsel stated for the record certain other matters that are to be considered as a part of the updated presentence report.

Upon conclusion of all the evidence and argument of counsel in regard to sentencing, the Court demanded of the defendant if he desired to make a statement or to advance any reason why judgment should not be pronounced against him. The defendant did make a statement to the Court, and upon the conclusion thereof, the Court being agreeable to the verdict of the jury, doth find the defendant, WILLIAM EVANS-SMITH, guilty of second degree murder and consistent with the jury verdict doth sentence the defendant to confinement in a facility operated by the Department of Corrections for the Commonwealth of Virginia for a period of twenty (20) years, and that the Commonwealth do recover against the defendant its costs by it about its prosecution in this behalf expended in the amount of $ to be determined.

Whereupon defense counsel advised the Court, and the Attorney for the Commonwealth and the Deputy Attorney for the Commonwealth that the defendant did intend to appeal and the defendant did state, in open Court, that he intended to appeal.

It is hereby ORDERED that with the defendant having noted his appeal in open Court, both in person and by counsel, that the execution of this sentence be and it is hereby SUSPENDED during such appeal provided such appeal is timely prosecuted.

Thereupon the defendant, by counsel, moved the Court to set bail pending appeal under §19.2-319 of the Code of Virginia. Upon the conclusion of all argument of counsel in regards thereto, the motion was denied.

The Court certifies that at all times during the trial of this case the defendant was personally present and his

attorneys were likewise personally present and capably represented the defendant.

And the defendant is remanded to the custody of the Sheriff.

ENTER: 14 August 1989

/s/ James H. Chamblin
JAMES H. CHAMBLIN, JUDGE

A COPY - TESTE
F.R. HOWARD, CLERK

By /s/ K M Acker
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Friday *the* 1st *day of* June, 1990.

William Evans-Smith,

Appellant,

against Record No. 1268-89-4
Circuit Court No. 4700

Commonwealth of Virginia,

Appellee.

From the Circuit Court of Loudoun County
Before Judges Keenan, Moon and Willis

This petition for appeal is denied for the following reasons:

1. When the sufficiency of the evidence is challenged on appeal, the evidence is construed in the light most favorable to the Commonwealth granting to it all reasonable inferences fairly deducible therefrom. *Higginbotham v. Commonwealth,* 216 Va. 349, 218 S.E.2d 534 (1975). The evidence in this case showed that the victim was killed by some criminal agent. There was evidence from which the jury could have found that the petitioner, at the time of her death, was the only person with an opportunity to kill her. Other circumstantial evidence tended to prove his guilt. The totality of the evidence which the jury could have reasonably believed was such that excluded every reasonable hypothesis except that the petitioner was the killer.

2. The trial court did not err in refusing to set aside the verdict on the grounds of alleged juror misconduct. The juror, Ms. Davis, revealed on *voir dire* that she had previously read newspaper accounts concerning the case but that she had little recollection of what she had read. Counsel did not object to the juror being seated on the jury and took the risk that other evidence might refresh her recollection.

The other juror, Ms. Grimm, was not asked if she had any association with law enforcement. She was asked if she had "ever been engaged in law enforcement work." Considering the phrasing of the question, her response could not be held to be untruthful. Even if she had been asked, the association she had nine years earlier with the CID in which her duties were to cut grass, act as a duty driver, secretary and mail clerk, were so tenuous an association with law enforcement work that the trial judge would not have been required to set aside the verdict.

In neither case was there any evidence that a juror failed to answer honestly a material question on *voir dire* and no further evidence that a correct response would have produced a valid basis for a challenge for cause. *McDonough v. Greenwood*, 464 U.S. 548 (1984).

3. The trial court did not err in admitting evidence of defendant's statements. *See Evans-Smith v. Commonwealth*, 5 Va. App. 188, 361 S.E.2d 436 (1987).

4. The trial court was not required to set aside the verdict due to arguments made in the Commonwealth's opening statement to which no objection was made. Rule 5A:18. Likewise, the Court will not consider on appeal

objections to matters argued in closing arguments which were not raised in the trial court. Rule 5A:18.

5. The trial court acted properly in curing any misstatement made by the Commonwealth in the closing argument and therefore was under no duty to set aside the verdict. *Lewis v. Commonwealth*, 211 Va. 80, 175 S.E.2d 236 (1970).

6. The trial court did not err in refusing to permit petitioner to impeach the general character of his own witness. There was no evidence of any drug involvement with Robert Rivera. The fact that Rivera may have had pending marijuana charges in Texas was not admissible to show that he had some connection with the Evans-Smith murder in Virginia merely because he was at a farm next door about two hours after the killing. *See Hines v. Commonwealth*, 136 Va. 728, 117 S.E. 843 (1923).

7. The trial court did not abuse its discretion in denying a motion for a change of venue. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985); *Tuggle v. Commonwealth*, 228 Va. 493, 503, 323 S.E.2d 539 (1980).

8. The trial judge was not required to reduce the jury's sentence to the same or a lesser sentence than was imposed in the first trial by that jury. *See Chaffin v. Stynchcombe*, 412 U.S. 17 (1973).

9. The trial court did not err in its determination that petitioner's retrial was not barred by Virginia's speedy trial statute. See Code § 19.2-234. The delay was concurred in by both defendant and the Commonwealth's attorney. *Stephens v. Commonwealth*, 225 Va. 224, 301 S.E.2d 22 (1983). The petitioner has not raised on appeal

the issue of whether or not the transcript as certified by the trial judge was accurate.

A Copy,

Teste:
Patricia G. Davis, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Tuesday *the* 26th *day of* June, 1990.

William Evans-Smith,

Appellant,

against Record No. 1268-89-4
Circuit Court No. 4700

Commonwealth of Virginia,

Appellee.

(Filed Nov. 2, 1990)

Upon a Petition for Rehearing
Before Judges Keenan, Moon and Willis

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 1st day of June, 1990, and grant a rehearing thereof, the said petition is denied.

A Copy,

Teste:
Patricia G. Davis, Clerk

By: /s/ Cynthia L. McCoy
Deputy Clerk

IN THE CLERK'S OFFICE OF THE CIRCUIT COURT OF THE COUNTY OF LOUDOUN, VIRGINIA TO-WIT: NOVEMBER 5, 1990.

THE FOREGOING ORDER WAS THIS DAY RECEIVED IN SAID OFFICE AND RECORDED.

/s/ Joyce M. Long
DEPUTY CLERK

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building, City of Richmond on Friday *the* 14th *day of* September, 1990.

William Evans-Smith,

Appellant,

against Record No. 901018
Court of Appeals No. 1268-89-4

Commonwealth of Virginia,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: /s/ R. R. Buriak
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

WILLIAM EVANS-SMITH, Petitioner,	)	
V.	)	CIVIL ACTION NO. 91-1547-AM
JOHN B. TAYLOR, Respondent.	)	

ORDER

For the reasons stated from the bench, it is hereby ORDERED that:

1. The motion of the respondent for summary judgment is granted.

2. The motion of the petitioner for summary judgment is denied.

3. The petition is dismissed.

/s/ A.V.B. Jr.
United States District Judge

Alexandria, Virginia
February 28th, 1992

ORIGINAL

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

WILLIAM EVANS-SMITH, Plaintiff, -vs- JOHN B. TAYLOR, Defendant.	CIVIL ACTION NO. 91-1547 AM

Friday, February 28, 1992
(Filed Apr. 13, 1992)

Alexandria, Virginia

Transcript of motion proceedings in the above-captioned matter.

BEFORE:
The Honorable ALBERT V. BRYAN, JR., Judge
United States District Court

APPEARANCES:
FOR THE PLAINTIFF:

J. FREDERICK SINCLAIR, ESQUIRE
OF: COHEN, DUNN & SINCLAIR, P.C.
221 S. Alfred Street
Alexandria, Virginia 22313

* * *

[p. 18] THE COURT: The defendant's motion for summary judgment will be granted.

Insofar as the sufficiency of the evidence is concerned, the petition was filed and indeed the reply to the defendant's motion seems to be proceeding on the State standard, that is, whether where there is circumstantial evidence, the burden is on the Commonwealth to prove guilt to [p. 19] the exclusion of any reasonable hypothesis of innocence; and that is not the standard, of course. The Federal standard and the constitutional standard, at least as far as this Court is concerned, is whether any rational trier of fact could have found from the evidence beyond a reasonable doubt the essential elements of the crime charged.

The burden is on the Federal Court in this situation to review the matter de novo, and I have.

But the evidence that the petitioner points out, that is the drag marks, it's doubtful, according to the petitioner, that they could have been made by the victim's heels because she was, there was evidence that that wouldn't have made those kinds of scuff marks, the likelihood or unlikelihood that the defendant, petitioner, could have carried this 145-pound woman upstairs; the evidence of a possible sexual assault, and a robbery; the evidence could, the jury could have inferred that another person could have been in the home, the evidence as to the hair types, that another car was seen leaving the area, that only one or very little blood samples consistent with the petitioner were found; the inferences to be drawn from the scratch marks on his arms, these were things that were in his favor at trial, but the jury was not required to accept those in the face of evidence that would indicate that he was the only person at home, that he was, at least at part of the time when she was [p. 20] determined to

have died, they could have well believed that this business about a possible sexual assault and robbery was planted evidence to indicate that such a thing happened, when in fact it didn't, that there was no other car leaving, that the scratches were from the victim's fingernail, that his reactions after he found his wife's murder were susceptible to different inferences, that the inconsistencies in his own testimony about when she waved to him and where she was when she waved to him, the business about getting everybody together and discussing what went on, it seems to me these are things that the jury could weigh and were not required to accept the position that the petitioner took and the inferences that he sought to have drawn from that evidence.

I find that insofar as – and it's true that at the second trial, there was no motive shown, but – but Judge Chamblin's canvas of the evidence, and indeed there is no challenge to what he finds the testimony to have been at trial, and really there cannot be, his recitation of the evidence is accurate.

The petitioner just seeks to have other inferences drawn from that testimony. But the jury was not required to do that, and I find that a rational trier of fact could have found beyond a reasonable doubt from this evidence that the defendant was guilty of the murder of his wife.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
April 18, 1994

No. 92-6347
CA-91-1547-AM

WILLIAM EVANS-SMITH

Petitioner - Appellant

v.

JOHN B. TAYLOR

Respondent - Appellee

On Petition for Rehearing with Suggestion
for Rehearing In Banc

The appellee's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,
/s/ Bert M. Montague
CLERK

Supreme Court, U.S.
FILED
AUG 17 1994
OFFICE OF THE CLERK

(2)

No. 94-97

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHN B. TAYLOR, WARDEN,
STAUNTON CORRECTIONAL CENTER,

Petitioner,

V.

WILLIAM EVANS-SMITH,

Respondent.

Brief in Opposition to the Petition for Writ of Certiorari to the Judgment of the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

*Gerald T. Zerkin
GERALD T. ZERKIN AND ASSOC.
Linden Tower Professional Centre
Suite 505
2nd & Franklin Streets
Richmond, Virginia 23219
(804) 788-4412

Ann B. Vance
CARR AND VANCE
29 N. King Street
Leesburg, Virginia 22075
(703) 777-3434

*Counsel of Record *Counsel for Respondent*

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

BEST AVAILABLE COPY

180 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
JURISDICTION	1
STATEMENT OF THE CASE	5
A. The Proceedings Below . .	5
B. The Facts in This Case . .	11
REASONS FOR DENYING THE WRIT . . .	29
I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS OPINIONS BELOW	29
II. CERTIORARI IS NOT AVAILABLE TO REVIEW THE FACT INTENSIVE ANALYSIS PERFORMED BY THE FOURTH CIRCUIT COURT OF APPEALS, WHICH INVOLVED NO "EXTENSION" OF EXISTING PRECEDENT	40
CONCLUSION	57
APPENDIX	
A. Opinion of Virginia Court of Appeals in William Evans-Smith v. Commonwealth, 5 Va. App. 188 361 S.E.2d 436 (1987)	1A

B. Letter Opinion of Judge James H. Chamblin, of February 1, 1993, William Evans-Smith v. Taylor, Law No. 13577 (State Petition for Habeas Corpus) . . 67A

C. Order denial of Petition for Writ of Certoriari, William Evans-Smith v. Taylor, 127 L. Ed.2d 567 (1994) 113A

D. Select testimony from Record of Forensic Pathologist, James C. Byer, M.D 114A

TABLE OF AUTHORITIES

CASES:

Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982) 57

Epperly v. Booker, 997 F.2d 1 (4th Cir.), *cert. denied*, 126 L.Ed.2d 575, 114 S.Ct. 611 (1993) 40

Evans-Smith v. Commonwealth, 5 Va. App. 188, 361 S.E. 2d 436 (1987) 7

Evans-Smith v. Taylor, 114 S.Ct. 1221 (1994) 10

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, *adhered to* 305 U.S. 124, *reh. den.* 305 U.S. 675 (1938) 5

Goldsmith v. Witkowski, 981 F.2d 697 (4th Cir. 1992). 4, 32

In Re Winship, 397 U.S. 358 (1970) 42, 50 56

Jackson v. Virginia, 443 U.S. 307 (1979) 3, 29 32, 39, 40, 42, 50, 56, 57

Leland v. Oregon, 343 U.S. 790 (1952) 42

NLRB v. Pittsburgh S.S. Co., 340 U.S. 498 (1951) 3

People v. Contes, 457 NYS2d 45 (A.D. 1982), *aff'd*, 467 NYS2d 349 (C.App. 1982) 48

Rice v. Sioux City Memorial Park, 349 U.S. 70 (1950) 4

Schad v. Arizona, 111 S.Ct. 2491 (1991) 35, 36 37, 38

Sneed v. Smith, 670 F.2d 1348 (4th Cir. 1982) 39

Stamper v. Muncie, 944 F.2d 170 (4th Cir 1991) 4, 33

United States v. Bagley, 105 S.Ct. 3375 (1985) 9

United States v. Menesses, 962 F.2d 420 (5th Cir. 1992) 56

United States v. Tresvant, 677 F.2d 1918 (4th Cir. 1982) 4, 32

Wright v. West, 112 S.Ct 2482 (1992) 39

RULES

Rule 10.1 *Revised Rules of the Supreme Court of the United States* 2

Rule 15, *Revised Rules of the Supreme Court of the United States* 11

Rule 35, *Federal Rules of Appellate Procedure* 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

NO. 94-97

JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER

Petitioner

v.

WILLIAM EVANS-SMITH

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JURISDICTION

Under the guise of seeking a grant of certiorari to review a decision of the Fourth Circuit Court of Appeals deemed "extremely important to the administration of justice," *Petition for Writ of*

Certiorari, p. 29, Petitioner invokes the limited jurisdiction and scarce resources of this Court to review a fact-specific decision that neither establishes new or controversial principles of law nor conflicts with a decision of another United States court of appeals on the same matter. In fact, the decision of the Fourth Circuit Court of Appeals in this case is not only legally unremarkable, it is correct on the merits of the underlying claim.[1]

Rule 10.1 of the Revised Rules of the Supreme Court of the United States provides that:

---

[1]It is so unremarkable that not a single judge of the entire United States Fourth Circuit Court of Appeals requested a poll on Petitioner's suggestion for rehearing *en banc*. Federal Rules of Appellate Procedure, Rule 35, provides that any judge, not only those on the panel, may request such a poll.

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

"Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public ... and in cases where there is *real* and *embarrassing* conflict of opinion and authority between courts of appeals.'" NLRB v. Pittsburgh S.S. Co., 340 U.S. 498, 502 (1951) (Citations omitted). In reality, no conflict exists between the decision of the Fourth Circuit Court of Appeals in the instant case and those of other federal courts of appeals, much less a conflict both "real" and "embarrassing".[2] Although Petitioner cre-

---

[2]Upon factual review of other habeas corpus cases on sufficiency grounds, the Fourth Circuit Court of Appeals has evaluated the cases under the same Jackson

atively presents his claim in the intellectually enticing rubric of the "new rule" doctrine, his fundamental underlying complaint is that the Court did not accept at face value the strained and even improbable "inferences" and conclusions which he urged upon it.

The potential for reviewing intellectually interesting, albeit in this case fictitious, issues, however, is not a basis for granting a writ of certiorari. Rice v. Sioux City Memorial Park, 349 U.S. 70, 74 (1950). The Supreme

---

standard as applied in this case, but with the resulting conclusion that the evidence was sufficient. E.g., Goldsmith v. Witkowski, 981 F.2d 697, 701 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 3020 (1993); Stamper v. Muncie, 944 F.2d 170, 174 (4th Cir 1991); and United States v. Tresvant, 677 F.2d 1018, 1921 (4th Cir. 1982); . The Court cited these cases in its decision in this case. Thus, if Petitioner's argument is correct, the Fourth Circuit Court of Appeals does not understand its own decisions.

Court has traditionally refrained from doing what Petitioner has asked it to do in this case, granting a writ of certiorari merely to review evidence or inferences drawn from that evidence. General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178, *adhered to* 305 U.S. 124, *reh. den.* 305 U.S. 675 (1938).

STATEMENT OF THE CASE

A. The Proceedings Below

The proceedings of this case are set forth in the opinion of the United States Fourth Circuit Court of Appeals (Petition, p. 2A-3A). The Respondent is a 74 year old man, who has spent the past five years of his life in the Virginia Department of Corrections for a crime he adamantly maintains he did not commit.

1. Petitioner has briefly stated the criminal and civil appellate record of this case in his Petition, p. 4. However, Respondent takes issue with Petitioner's characterization that "[r]espondent's first conviction was reversed by the Court of Appeals of Virginia when it ruled that the trial court had erred in admitting certain evidence involving the victim's statements that her husband had tried to kill her and describing his anger and hostility" (Id.). This is an incorrect statement of fact and a blatant attempt to bias this Court. In fact, the only hearsay testimony concerning a purported attempt by Evans-Smith to kill his wife had actually been deemed inadmissible *by the trial court* upon voir dire of the witness at the first trial. Consequently, there was no such testimony at

trial. Evans-Smith v. Commonwealth, 5 Va. App. 188, 361 S.E. 2d 436 (1987) (Reply, p. 1A, 15A-17A)[3]. The Virginia Court of Appeals observed that:

> "In excluding the victim's statement to Cook that, 'Your father tried to kill me last night,' the trial court correctly ruled that this constituted an inadmissible opinion. We believe the victim's other statements to her daughter and her friends were likewise inadmissible opinions."

(Reply, p. 30A).

2. During the proceedings on Respondent's Federal habeas corpus petition, Respondent initiated an additional habeas corpus proceeding in the State trial court as the result of newly discovered exculpatory evidence which had been withheld by the prosecution. The State petition was based upon the discovery by the

---

[3]The appendix to this Brief in Opposition shall be referenced throughout this document as Reply, p. ___A.

defense of a previously unknown witness, Karen Spalding. On the morning of the murder in question, between the hours of 7:30 a.m. and 8:00 a.m., Ms. Spalding observed a suspicious, blond haired man walking near the Evans-Smiths' farm gate as she passed that way by vehicle when taking her daughter to school. She was stopped during an April 16, 1985, road check by Loudoun County sheriff investigator Jay Merchant and was questioned about her observations the day before, and remembering later that day she had seen this suspicious man, she relayed the information to Merchant by telephone.

Subsequent to an extensive hearing on the issues, the trial court in a February 1, 1993, letter opinion ruled that although "...[t]he information given to Merchant by Spalding is clearly exculpa-

tory evidence," under United States v. Bagley, 105 S.Ct. 3375 (1985), the evidence was immaterial, in spite of the entirely circumstantial nature of the case. (Reply, pp. 67A-112A).[4] Evans-Smith

---

[4]In pertinent part, the trial court stated:

> "Even though the case against Evans-Smith was entirely circumstantial, there was sufficient circumstantial evidence presented at trial to convict him. There is no need to review that evidence here as this Court reviewed it in detail in its opinion letter of July 21, 1989 when the motion to set aside the verdict for insufficient evidence was denied. This ruling has been reviewed by the Court of Appeals and the Supreme Court of Virginia, and neither court reversed that decision.
>
> "The jury heard evidence of at least two other suspicious incidents and/or persons near in place and time to the murder but found the Petitioner guilty. This Court is of the opinion that even if the jury had received evidence of a suspicious unknown person with blond hair on Route 725 near the Evans-Smith farm on the morning of the murder, the result would have been the same despite the evidence of one blond hair

appealed the denial of the requested writ to the Virginia Supreme Court, which petition was denied on October 26, 1993. He then filed a petition for writ of certiorari to this Court, which request was denied on March 7, 1994. Evans-Smith v. Taylor, 114 S.Ct. 1221 (1994) (Reply, p. 113A).

> of unknown origin (not forcibly removed, but fallen out) found on the stairway leading to the bedroom where Barbara was found and one hair of unknown origin found near her hand. There was no evidence of a forced entry. There was no evidence of any outside dirt, mud or moisture being tracked inside the house. The Commonwealth's forensic scientist, Deanna Dabbs, testified at length at the trial about how unknown miscellaneous hairs can be present at a crime scene. This Court is of the opinion that even if the jury had heard Spalding's testimony, there is no reasonable probability that the outcome would have been different."

Reply, pp. 105A-107A.

B. The Facts In This Case

The facts of this case have been iterated in accurate detail in the opinion of the United States Fourth Circuit Court of Appeals (Petition, pp. 3A-17A). Respondent notes that Petitioner's version of the facts often deviates from the Fourth Circuit Court of Appeals review of the record as well as the record itself.

As required by Rule 15, Revised Rules of the Supreme Court, the following is a discussion of facts which the Respondent represents are misstated in Petitioner's rendition of the facts of this case, whether appearing in the Petition's *Statement of the Case* or in the text of his argument.

1. Petitioner asserts that the Evans-Smiths' daughter, Lesleigh Cook, arrived at the farm the morning of the

murder between 10:30 and 11:00 a.m. (Petition, p. 5). In fact Mrs. Cook's testimony at trial is that she arrived no earlier than 11:00 a.m.[5] (R. 1161). Another prosecution witness, William Laycock, testified that at 10:30 a.m., on April 15, 1985, Mrs. Cook was visiting with him on the road for about a half an hour prior to going to her parents' farm. (R. 243). Moreover, the testimony of others corroborate this time-frame. (R. 274, 278, 290, and 293). The apparent purpose for Petitioner's attempt to place Mrs. Cook at the crime scene prior to 11:00 a.m. would be to provide an explanation why a neighbor saw and heard some

---

[5]The Fourth Circuit Court of Appeals appropriately notes that the time was approximately 11:00 a.m. (Petition, p. 5A).

one leaving the Evans-Smiths' driveway earlier that morning. (R. 1449-1453).

2. Petitioner misrepresents that Mrs. Cook used her CB to summon two men (Petition, p. 5). The evidence is that she used the CB to tell her friend, William Laycock, what she had seen at her parents' house, and he agreed to call the house to see if Mrs. Evans-Smith would answer the telephone. (R. 1165-1166). It was Mr. Laycock's decision, when no one answered the telephone at the Evans-Smiths' farm, to come to the farm and to bring with him Robert Brown. (R. 243-245).

3. In his Statement, Petitioner asserts that, while Brown, Laycock and Cook were "[s]earching the house," one of them found Mrs. Evans-Smith's body. (Petition, p. 5). However, the actual

testimony is that the three of them entered the house through the kitchen, and Brown went directly upstairs *after being told by Mrs. Cook that her mother's room was up the stairs*, while Cook and Laycock remained at the bottom of the stairs. (R. 246-248, 274-276, 1167). There was no testimony that Brown went to any room other than Mrs. Evans-Smith's bedroom.

4. Petitioner misstates the evidence that the medical examiner who conducted the autopsy (James C. Byer, MD.) "was of the opinion that a pair of panties stuffed in the victim's mouth [(a)] as if to gag her screams [(b)] had ... been placed there after death." (Petition, p. 5).

(a) Nowhere in the trial record is there a statement by Dr. Byer concerning an opinion on the purpose for the place-

ment of the panties in the victim's mouth. (R. 714-744, 1776-1778)(See also, Reply, pp. 114A-116A). However, Respondent concedes that the fact the panties were found in her mouth creates a reasonable inference that they were used as a gag.[6]

(b) There is no testimony by Dr. Byer that establishes directly or by inference that he believed the panties had been placed in the victim's mouth after her demise. (Reply, p. 114A-116A). The stipulation of his opinion introduced at trial related to blood observed in the victim's ear from a crime scene photograph. Byer opined that the blood like fluid "could have flowed into the ear

---

[6]The Evans-Smith farm is relatively remote in rural Loudoun County, and there is no evidence in the record that any one reported hearing the victim scream.

during the time the ligature was put on or at a substantially later time. I have no opinion as to when it actually happened." (Reply, p. 115A). The only qualification he expressed was:

> "If the material in the ear came from the mouth, the gag was placed in the mouth after the initial discharge from the mouth because if the gag was there first, it would have undoubtedly absorbed the material."

(Id.) What the prosecution did not ask the Doctor to clarify at trial was whether or not she may have been alive and conscious during what Dr. Byer characterized as the "initial discharge."[7] Without such a clarification, none of this evidence establishes or creates an infer-

---

[7]It is clear from the evidence that at some time after the ligature was placed upon her neck, Mrs. Evans-Smith was sufficiently conscious to attempt to remove it, causing the deep gouges found by Dr. Byer on the left front side of her neck. (R. 719).

ence, let alone a "reasonable" inference, that the panties could only have been placed in the victim's mouth after her demise.

5. Petitioner makes the unreasoned observation that a button from the victim's nightgown found on the floor near her bed suggests "that the nightgown had been ripped open in the bedroom *rather than earlier during the assault.*" (Petition, p. 5)(emphasis added).[8] The relevance of this qualification to Respondent's alleged guilt is unclear. The statement seems to imply that there is evidence that the "assault" on Mrs. Evans-Smith had in some way ended prior to

---

[8]The fact that there was no evidence from the victim's robe and nightshirt on the stairs, including any buttons, substantially undercuts the prosecution's theory that Mrs. Evans-Smith was dragged by her ankles up the stairs by one person.

the robe being ripped open in her bedroom, of which there is no evidence. Regardless, the button issue raised by Petitioner creates no evidence or inference that could contribute to a finding of Respondent's guilt.

6. Petitioner characterizes Respondent's bedroom as "tidy except for items of his jewelry which had been laid out across his bed." (Petition, pp. 5-6). There is nothing in the record of testimony that "jewelry" was laid out across Respondent's bed, only that the contents of two wooden boxes, which officers characterized as what appeared to be "jewelry" boxes were found on Respondent's bed. (R. 336, 376, 536-537). In fact there is no characterization of what the contents of the boxes were on the bed in any testimony at trial, although a photograph

was submitted into evidence reflecting the scene.

7. Petitioner states that the table at the foot of the stairs had been laid on its side, defying the laws of physics. (Petition, p. 6). The problem is that no one at trial described in his testimony that the table was laid there as opposed to having fallen there, and no expert testified that the table could not have fallen in the manner it did. Consequently no reasonable inference could be drawn from the position of the table. Whatever the case, the table was located near the foot of the stairs up which the Commonwealth theorized that Mrs. Evans-Smith was forcibly taken. Considering the location of the table and the narrowness of the hall in relation to the stairwell, it seems unlikely that the murderer(s)

could have maneuvered Mrs. Evans-Smith through that portion of the hallway without upsetting the table, whether she was being dragged or not.

8. In several places in the petition, Petitioner attempts to quantify Dr. Hocker's estimate of the time of death as more likely being 6:00 a.m., than within the range of 4:00 a.m. to 8:00 a.m. (Petition, pp. 6, 23, and 27). In reality, there was nothing in Dr. Hocker's testimony that indicates that 6:00 a.m. was any more likely than 8:00 a.m. (R. 924-1346.) Indeed, Dr. Hocker explained at trial what he meant by his reference to her death occurring "*around 6:00 a.m.*", as follows:

> Estimating about a 60 percent degree of rigor mortis and at 1:00 p.m., allowed me to state that probably the death had occurred *around 6:00 a.m.*

> There is a variable in this case. Individual bodies have a varying degree of which they develop rigor mortis, the temperature of the room. *And so, contrary to any fictional accounts of placing time of death, you cannot be that specific. And so when we say approximately, we allow a time, in this case, of two hours either side of that time.*

(R. 929) (emphasis added).

9. Petitioner exaggerates the time Evans-Smith told investigators that he sat down to have breakfast with his wife. (Petition, p. 6). Investigator Jeff Brown testified that upon Merchant's and his first visit with Evans-Smith at his office the afternoon of the murder, Respondent told them he sat down for breakfast with his wife at approximately 6:00 a.m. (R. 579). At the April 17, 1985, interrogation at which both Brown and Merchant were present, Brown testified Evans-Smith said he sat down to breakfast with his wife at 5:45 a.m. (R. 588-589),

and Merchant said Evans-Smith told them, "About 5:30, maybe 20 of 6:00 ... *or 20 of 6:00, yes, at that point.*" (R. 680). Clearly the earliest time attributable to a statement by Evans-Smith from this testimony is that he may have *sat down for breakfast* as early as 5:40 a.m. Furthermore, regardless of what time he sat down with his wife, the testimony is consistent that Mrs. Evans-Smith remained at the kitchen table with the newspaper when he went upstairs to shower and dress for work.

10. In arguing that Evans-Smith was late to work within a time range of 15 minutes to one hour, Petitioner relies upon the testimony of Dorothy Lohman as the only witness to address Respondent's "usual" arrival time as "between 7:30 and 8:00 a.m." (Petition, p. 6). Petitioner

also raises this issue in other portions of his argument (Petition, pp. 12, 24, and 27-28) to support the premise that Evans-Smith was at the residence when his wife was killed. The relevance of the possibility versus proof of his presence beyond a reasonable doubt is well addressed by the Fourth Circuit Court of Appeals, (Petition, pp. 11A, 12A, 12A n.11, and 29A).

In fact, Dorothy Lohman testified at trial only that she "liked to get to the office a little early and [she] would usually get there between 7:30 and 8:00 o'clock in the morning." (R. 814). She testified that "[v]ery often [Respondent's] would be the first car there and sometimes mine would be the second. So

he was often in at the same time." (Id.)[9] However, Lohman did not testify whether or not she noticed his car in the parking lot the morning of April 15, 1985, when she arrived, and she did not state the time of her arrival that morning.[10]

---

[9]The characterization as "often" or even "very often" does not mean that this was *always* or even "usually" the case.

[10]This same witness testified that she did not see the Respondent in his office at 8:45 a.m. She further testified that when she met with him around 11:00 a.m. that morning to edit a book, she observed that: "I thought that day his mood was rather pleasant and I thought that was a little bit unusual for that time period." (R. 821). The Commonwealth urged upon the jury that this created an inference of guilty conduct, that somehow the Respondent would have been in an unusually pleasant mood *some five hours after killing his wife in a sudden heat of passion*, as opposed to having had a lovely Easter weekend with her at the farm and the Oatlands' point-to-point races.

11. Petitioner persists in asserting without basis that there was evidence to support an unclear theory advanced by the Commonwealth at trial that the Respondent killed his wife in the kitchen and then dragged her upstairs, or knocked her out in the kitchen and then strangled her upstairs. (Petition, pp. 7-9 and 24-25). Petitioner argues the following evidence would support an inference (as opposed to a "reasonable" inference) that an unknown[11] intruder could not have initially attacked Mrs. Evans-Smith at the kitchen table, rendered her unconscious, and dragged her up to her second story bedroom where the final strangula-

---

[11]Petitioner again uses inverse logic, urging that all the Commonwealth need prove is that the killer was known to the victim and, therefore, could only have been the Respondent.

tion occurred. Petitioner states the evidence supporting this theory is the *slight* displacement of the kitchen table and hutch behind it from their usual locations,[12] *fantasized drag marks* on the kitchen floor caused by the victim's heels,[13] the table *laid on its side as opposed to having been knocked over* at the foot of the stairs, and the medical

---

[12]One would think that if the attack began at the kitchen table, the table would be more than slightly askew. Moreover, there is the unexplained circumstance of the front door being found ajar when Ms. Cook arrived at the farm at 11:00 a.m. (R. 1165).

[13]The Court accurately discusses the state of the evidence on the "drag" marks as actually "scratch" marks on the linoleum floor. In fact Special Agent Ritchie testified that: "They were more like scratch marks, parallel scratch marks in the linoleum." (R. 393). There is nothing in the record that would support an inference, let alone a "reasonable" inference that these marks were caused by the victim's heels or slippers.

examiner's testimony that the injury to the back of the victim's head *could* have been caused by bouncing against wooden stairs. The Fourth Circuit Court of Appeals addressed the obvious factual problems with this assertion in great detail. (Petition, p. 20A n.18).

12. Petitioner argues that certain aspects of Respondent's conduct and statements indicated a guilty conscience. Of particular note, the petition argues that Respondent evidenced no tears or shock upon the news of his wife's murder. (Petition, pp. 8 and 28). Clearly the testimony of both sheriff investigators, Brown and Merchant, indicated evidence of both shock and emotion, including (1) respondent's rapid questioning of them about what had happened after they told him of his wife's murder (R. 973-975),

(2) his statement of "oh, my god, the van" when Brown mentioned that it appeared a burglary had occurred (R. 976), (3) Respondent's actions in his car, observed by Brown when Respondent stopped at traffic lights while driving home in front of the officers' vehicle after having been told of her murder, regardless of the officer's impression of them (R. 979), and (4) his repetition of his daughter's name upon first seeing her after finding out about the murder indicated shock and grief (R. 1173). As the Court observed, the Petitioner's suppositions of Respondent's behavior "are derived from acts of his consistent with a husband's perfectly proper behavior mixed with the imaginations of behavior for which his presence has not been proven." (Petition, p. 29A).

REASONS FOR DENYING THE WRIT

I. THE DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS CREATED NO NEW RULE.

In this case, the United States Fourth Circuit Court of Appeals acknowledged, restated, and affirmed each and every relevant principle of law which governs the consideration of a claim under Jackson v. Virginia, 443 U.S. 307 (1979) in federal habeas corpus proceedings. Petitioner's meritless complaint is that the Court departed from established precedent to the point of making a new rule, by applying the "beyond a reasonable doubt" standard to its consideration of "basic facts" and "preliminary inferences," rather than to the evidence as a whole.

Petitioner cites four instances in which the Court allegedly "acknowledged that it was requiring *basic facts and*

preliminary inferences from the basic facts to be proven individually beyond a reasonable doubt." (Petition. pp. 11-12) (emphasis added). Regardless of these characterizations, it is clear from the Court's decision that the conclusion urged by Petitioner cannot be divined, given the Court's clear and unequivocal statements to the contrary. Moreover, in connection with each instance as to which Petitioner complains, he has not identified the facts that are "basic" versus "ultimate," nor which inferences to be drawn from those facts are "primary" (Petition p.23), "preliminary" (Petition p.25), "intermediate" (Petition p.25), or essential to a finding of guilt.[14] Con-

---

[14]It is unclear upon how many levels of inferences Petitioner's case depends, but it is obviously several. Thus, the Fourth Circuit Court of Appeals was actually generous to Petitioner when it noted

sequently, the characterization of any particular evidence as basic facts and preliminary inferences is a fiction when the singular objective of Petitioner is to identify Respondent as the murderer.[15]

---

that "[o]nce again, what is required here, in order to find for the Commonwealth, is a kind of *double* inference." (Emphasis added). (Petition, p. 25A n.25).

[15]Concerning the particular query as to the manner in which the victim was killed, and, thus, whether Colonel Evans-Smith could have accomplished the acts attributed to him by the prosecution, the Fourth Circuit Court of Appeals noted that each of the Commonwealth's theories would have required Evans-Smith, "a 64-year-old man in admittedly good shape," to carry or drag his wife's "heavy" body upstairs by her ankles "without doing any further damage to her body or any damage to the house." Mrs. Evans-Smith had only "a defined internal contusion" on the back of her head, which is plainly inconsistent with the Commonwealth's theory that she was dragged by her ankles up 13 steps. (Petition, p. 20A n.8). The Court correctly noted that there was no evidence in the record that could have supported such a conclusion. (Petition, p. 20A n.8).

The unavoidable fact is that the Fourth Circuit Court of Appeals stated unequivocally and repeatedly that the requisite legal analysis is just as Petitioner himself states it to be.

> The standard of review for a claim of insufficient evidence is whether, viewing the evidence in the light most favorable to the prosecution, Goldsmith v. Witkowski, 981 F.2d 697, 701 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 3020 (1993), and according the benefit of all reasonable inference to the government, United States v. Tresvant, 677 F.2d 1018, 1921 (4th Cir. 1982), any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

(Petition, p. 17A). The Court also noted:

> [t]he question before us in the instant case, therefore, is whether the wholly circumstantial evidence, *taken together*, could allow any rational trier of fact to conclude *beyond a reasonable doubt* that Evans-Smith murdered his wife. In conducting such an inquiry *we consider all the evidence presented in the record.*

(Petition, p. 18A)(second emphasis in original). After its description and analysis of the evidence, the Court iterated:

> At the outset, it is worth noting that circumstantial evidence need not exclude every reasonable hypothesis of innocence. Stamper v. Muncie, 944 F.2d 170, 174 (4th Cir. 1991). Rather, "circumstances altogether inconclusive if separately considered, may, by their number and joint operation...be sufficient to constitute conclusive proof." Id. (internal quotation marks and citations omitted).

(Petition, p. 27A).

Thus, the "rule" of the case is in no sense "new." In light of these plain and unimaginative restatements of the law, including all the consideration to which the Commonwealth is entitled, it is difficult to take seriously Petitioner's prediction of a jurisprudential maelstrom arising from this decision that will engulf not only the fragile world of

federal habeas corpus, but the criminal justice system generally. (Petition, pp. 28-29).

Petitioner simply ignores each of the clear and correct statements of law set forth above in the Fourth Circuit Court of Appeals' opinion. He also ignores the Court's actual discussion of the evidence by focusing entirely on isolated references to the "beyond a reasonable doubt" standard, primarily in one footnote.[16] Contrary to Peti-

---

[16]It is difficult to believe that certiorari is actually available to review a lower court's comment in a footnote that "more witnesses stated that he had arrived at the normal time than stated that he had been late, thus corroborating Evans-Smith's own statements." (Petition, p. 22 n.8, 12A n.11). Petitioner of course ignores both the real import of that footnote and the real evidence. As the Court noted, the *only* witness who testified that Colonel Evans-Smith arrived at work late "based her conclusion on her *not* having seen him *in his office*." (First emphasis in original). Testimony that a

tioner's assertions, it is readily apparent from the Court's actual analysis of the evidence that it did, in fact, apply the correct principles of law with which it began and ended that analysis.

Petitioner's attempt to draw an analogy to Justice Scalia's hypothetical in Schad v. Arizona, 111 S.Ct. 2491, 2506 (1991) plainly fails. (Petition pp. 19-20). The hypothetical postulated by

---

social science research program director was not physically within the confines of his own office at a particular moment is hardly persuasive or even remotely significant evidence that he was "late for work." Thus, the Court actually gave the Commonwealth's case more credit than it deserved when it engaged in what Petitioner characterizes derisively as the "cruel expedient of counting heads among witnesses." (Petition, p. 22 n. 8.) The simple fact is that, on its side of the ledger, the Commonwealth had no witnesses whose testimony, *when considered as a whole*, could establish that Evans-Smith arrived at work late.

Justice Scalia in Schad,[17] demonstrates only that, consistent with prior opinions of the Court, it is unnecessary for a jury to demonstrate unanimity as to the "requisite *actus reus*." The hypothetical was, by its own terms, based on the fact that the defendant *could have* accomplished the killing by alternative means and that, thus, resolution of the factual dilemma was irrelevant to either the

---

[17]Schad presented the question of whether the Due Process Clause requires a sentence of death to be set aside where it is impossible to determine from the verdict upon which theory of the defendant's mental state the jury relied in sentencing the defendant to death and whether it was unanimous as to any one theory. This Court found that no constitutional violation had occurred. However, it is of significance that there was no claim in Schad that one of the alternative grounds was either legally or factually defective. Furthermore, all nine Justices recognized the existence of limits on the principle that the jury need not be unanimous as to the theory of guilt.

identity of the killer or any other element of the offense.[18]

There is not a comparable issue raised in this petition. Here, the Fourth Circuit Court of Appeals' discussion of the evidence related to the ability of Evans-Smith to accomplish the murder in the manner suggested by the Commonwealth. If he could not have done so, then he could not be the perpetrator, just as, if he was not there at the time of the crime, he could not be the perpetrator. Thus, the failure of the Commonwealth to prove beyond a reasonable doubt that Respondent could have accomplished the murder in the manner suggested by it

---

[18]Resolution of the factual dilemma in Justice Scalia's hypothetical would not be academic, under any of the opinions in Schad, including his own, if, for example, a killing accomplished by arson constituted a capital offense while a killing by strangulation did not.

(or that he was there when the murder was committed) is equivalent to the "ultimate fact" of the killer's identity.[19] The Fourth Circuit Court of Appeals' analysis, therefore, is not flawed.

In the final analysis, Petitioner's argument is predicated on ignoring the Fourth Circuit Court of Appeals' acknowledgment of all relevant legal principles, a fact obviously recognized by all of the judges of the Court when they denied Petitioner's request for rehearing *en banc*.

---

[19]Petitioner's dramatic attempt to characterize the Fourth Circuit Court of Appeals decision in its "crystal bud vase" analogy (Petition, p. 20 n.5) under some formulation of the Schad decision reflects how unreasonable Petitioner's criticisms of the Court's decision are. The real point is that there was no such evidence linking the Respondent to the victim, which was the cause for the Fourth Circuit Court of Appeals conclusions reached in its decision.

As Justice Kennedy observed in his concurrence in Wright v. West, 112 S.Ct. 2482, 2499 (1992):

> By its very terms [Jackson] provides a general standard which calls for some examination of the facts. The standard is whether any rational trier of fact could have found guilt beyond a reasonable doubt after a review of all the evidence, so of course there will be variations from case to case. Where the beginning point is a rule of this general application, a rule designed for the specific purpose of evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent.

Clearly no new rule of law was created by the Fourth Circuit Court of Appeals in this case, despite the imaginative lawyering evidenced by the petition.[20]

---

[20]The Fourth Circuit Court of Appeals has consistently applied the rule of Jackson in numerous post-conviction cases in addition to those cited in its decision in this case. See, e.g., Sneed v. Smith, 670 F.2d 1348, 1352 (4th Cir. 1982)(affirming denial of the writ); Epperly v.

II. CERTIORARI IS NOT AVAILABLE TO REVIEW THE FACT INTENSIVE ANALYSIS PERFORMED BY THE FOURTH CIRCUIT COURT OF APPEALS, WHICH INVOLVED NO "EXTENSION" OF EXISTING PRECEDENT.

Petitioner's argument that the United States Fourth Circuit Court of Appeal's opinion is an unauthorized extension of the Jackson v. Virginia "reasonable doubt standard" is equally as specious as his "new rule" argument. It is in fact Petitioner, not the Fourth Circuit Court of Appeals, who has "disregarded the significance of the evidence as a whole." (Petition, p. 23). The Court simply refused to consider snippets of evidence in isolation, unrelated to the remainder of the Commonwealth's own evidence and unrelated to the entire testimony of any given witness, and re-

Booker, 997 F.2d 1, 6-9 (4th Cir.) *cert. denied*, 126 L.Ed.2d 575, 114 S.Ct. 611 (1993).

fused to make the leaps of logic urged by Petitioner's view of the evidence. (Petition, p. 23A n.22). This fact is elemental in the Court's ultimate ruling that:

> ...the evidence assessed in its entirety and in the light most favorable to the prosecution is not sufficient to persuade any rational trier of fact of the petitioner's guilt beyond a reasonable doubt, that Evans-Smith's conviction on the evidence therefore violated his constitutional right to due process, and that he is entitled to the relief sought in this habeas corpus proceeding. Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven. *To start with the assumption that the crime was committed and then to show that each piece of circumstantial evidence can be explained in a consistent manner is fundamentally different from examining each piece of evidence and finally concluding beyond a reasonable doubt that the defendant was guilty. The prosecution has attempted to accomplish only the first alternative, not the*

> *second. As the Supreme Court has long taught "it is the duty of the Government to establish . . . guilt beyond a reasonable doubt."* In Re Winship, 397 U.S. 358, 362, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970) (quoting Leland v. Oregon, 343 U.S. 790, 802-803, 96 L. Ed. 1302, 72 S. Ct. 1002 (Frankfurter, J., dissenting)). Such guilt has not been established, and, as a consequence, Evans-Smith's right to due process has been violated.

(Petition, p. 29A)(emphasis added).

Petitioner complains that the Court's application of Jackson, "gives virtually no 'play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' Jackson, 443 U.S. at 319." (Petition, pp. 21-22). What Petitioner persists on ignoring is that the Court applied this exact evaluation and specifically addressed what conflicts existed

and what "reasonable" inferences could be drawn from the evidence in this case by any jury.

1. Petitioner argues that Dr. Hocker's testimony established that 6:00 a.m. "was the *most likely time* of death." (Petition, p. 23)(emphasis added). Even Petitioner acknowledges, however, in its rendition of the facts, that Dr. Hocker did not so testify. The best Petitioner can argue is that such a conclusion is "*implicit* in the doctor's testimony." (Id.)(emphasis added). However, Dr. Hocker's testimony is devoid of any such implication. As mentioned earlier in this Brief in Opposition, Hocker stated in relevant part:

> There is a variable in this case. Individual bodies have a varying degree of which they develop rigor mortis, the temperature of the room. *And so, contrary to any fictional accounts of placing time of*

> *death, you cannot be that specific. And so when we say approximately, we allow a time, in this case, of two hours either side of that time.*

(R. 929) (emphasis added).

Consequently, there is no evidence in this case that provides any basis for an inference, let alone a "reasonable" inference, to be drawn that Mrs. Evans-Smith's time of death was at 6:00 a.m. or more likely than not at 6:00 a.m.

As the Fourth Circuit Court of Appeals correctly noted, according to the forensic evidence Mrs. Evans-Smith could have been killed as late as 8:00 a.m. The medical examiner who performed the autopsy established that she died within thirty to sixty minutes after she ate. The only evidence as to when she may have eaten came from Evans-Smith himself, who reportedly told investigators that he sat down with her sometime between 5:40

a.m.[21] and 6:00 a.m. and that he left for work between 6:20 and 6:25 a.m. The evidence also revealed a window of up to an hour and a half between when he said he left for work and her murder. (Petition, pp. 26A-27A, ns. 27 and 28). As the Court noted, "We must not re-weigh the evidence, but it is worth illustration that the victim could easily have been killed after Evans-Smith left." (Id. n.28).

---

[21]Petitioner states that the time range during which Respondent ate breakfast with his wife was actually between 5:30 a.m. and 6:00 a.m., which conclusion was adopted by the trial court in the judge's letter opinion rendition of the facts. (Petition, p. 35A). The testimony of the investigators, however, reveals inconsistencies in their testimony relating to the same conversation with Evans-Smith, which at best establishes that he told them during a joint interrogation that he had breakfast at 5:40 (Merchant R. 679-680) or 5:45 a.m. (Brown R. 588).

2. Petitioner next asserts that Evans-Smith's time of arrival at work "was important in the proof of his guilt...," which the Court disregarded. (Petition, p. 24). Petitioner relies upon the testimony of Ms. Lohman as the proof of his lateness. As discussed previously, the only evidence presented by Ms. Lohman was that she did not see him *in his office* at 8:45 a.m. on April 15, 1985. She did not testify as to when she arrived at work that day or whether when she did arrive if she noticed that his car was not in the parking lot. At best, her testimony established that the Respondent was often at work around the same time she normally arrived (an unspecified time between 7:30 a.m. and 8:00 a.m.), which she described as "early". Another prosecution witness and co-worker

of the Respondent, James Rudolph, testified without contradiction that the office was on a flex time, and that the established time of arrival for employees was between 8:00 a.m. and 8:30 a.m. (R. 987). The fact that Ms. Lohman did not see the Respondent in his office at 8:45 a.m. that morning is a far cry from evidence that he was not *at work* earlier than that, even between 7:30 a.m. to 8:00 a.m., the time she described as that by which he "often" arrived.

In essence Petitioner is arguing that the jury was free to resolve the evidence against Evans-Smith by speculating from this incredibly thin evidence that he was late to work because he was otherwise criminally occupied earlier that morning. Not only was there no evidence to justify this inference, there

was no evidence to justify the "basic" fact that he had arrived at work late. This, as the Fourth Circuit Court of Appeals ruled, is not the basis for a finding of Respondent's guilt beyond a reasonable doubt. *See*, People v. Contes, 457 N.Y.S.2d 45, 46 (A.D. 1982), *aff'd*, 467 N.Y.S.2d 349 (Ct. App. 1983) (the State's obligation to prove guilt beyond a reasonable doubt "necessarily includes the obligation to prove beyond a reasonable doubt that the defendant was at the criminal scene at the time, which, in turn means proof - express or implied - beyond a reasonable doubt that the defendant was not somewhere else.")

3. Petitioner asserts that the Fourth Circuit Court of Appeals "evidently disregarded" evidence that scratches on Evans-Smith's arm "*could have been*

caused by human fingernails such as the victim." (emphasis added). The probable reason for the Fourth Circuit Court of Appeals position on this issue is that there was no forensic evidence that the victim actually scratched anyone other than herself. It is Petitioner's position that this elemental fact be ignored and that a jury be allowed to infer from only the scratches found upon the Respondent, that he had been scratched by the victim. To complicate matters further, Petitioner's position requires the jury to choose among conflicting testimony of the prosecution's expert witnesses as to whether in fact the scratches found on the Respondent could have been caused by fingernails, let alone fingernails like the victim's. Although one medical examiner stated that the scratches could have

been caused by human fingernails such as the victim's, two other medical experts put on by the Commonwealth testified to the contrary. Thus Petitioner's real complaint with the manner in which the Fourth Circuit Court of Appeals evaluated this evidence is that the Court did not accept Petitioner's assertion of a jury's "right" to engage in abject speculation on this issue. Neither Winship nor Jackson nor their progeny require the selective approach to the evidence that Petitioner proposes. Guilt beyond a reasonable doubt cannot be founded on such slender reeds.

4. Petitioner argues next that the Fourth Circuit Court of Appeals disregarded the evidence that the unconscious victim had been dragged from the kitchen up the stairs to the bedroom and the

resulting inference that the attack began at the kitchen table. (Petition, pp. 24-25). Here, contrary to the rhetoric of his arguments in the petition, Petitioner in fact urges that the Supreme Court actually create a new rule that the federal courts **not** consider the totality of the prosecution's own evidence.

No evidence established that either the victim's feet or her slippers could have made the marks on the kitchen floor.[22] Moreover, Petitioner has no explanation for the gravity defying notion that the victim could have been dragged up thirteen steps by her feet and

---

[22]Petitioner has persisted in arguing that the scrape marks found on the kitchen floor originated from the victim's slippers or her bare feet. (Petition, pp. 7-8). Considering the direct testimony to the contrary concerning the victim's slippers, it is *impossible* to create a "reasonable" inference that they were caused instead by the victim's bare heels.

not suffered any further injuries to her head, body, and clothing (as there was with the button from her robe in the bedroom). In short, the Petitioner simply ignores these gaping holes in its theory of the crime.

5. Petitioner asserts that "the jury could have inferred...that the crime was unplanned and thus had been committed in a sudden heat of passion." (Petition, p. 25). The problem again is that such inferences must be reasonable in light of the evidence of the case. In fact, there was no evidence on this issue to give rise to such an inference. Petitioner surmises that the Fourth Circuit Court of Appeals "evidently concluded that this intermediate inference had not been proven beyond a reasonable doubt, from the Court's finding that "[n]o evidence of

... heat of passion was introduced at trial." (Petition, p. 18A). (Id.) However, there is not the slightest suggestion that the Court applied the reasonable doubt standard to this imaginary "intermediate inference." The Court merely recited the fact that not only was there no such evidence, but the evidence indicated the contrary.[23]

---

[23]As much of this Brief in Opposition demonstrates, Petitioner's arguments in this case require that neither the absence of evidence nor evidence to the contrary be allowed to interfere with a jury's right to unbounded speculation. Petitioner finds no problem with a jury concluding here that the "crime had been committed in a sudden heat of passion" based on the "hasty and poorly-conceived way in which the scene had been staged." (Petition, p. 25). In fact, the inference which Petitioner urges as "reasonable" would be entirely speculative even in the absence of the evidence that Respondent and his wife were observed enjoying each other's company the day before her murder.

6. Finally, Petitioner makes much of what he characterizes as "conduct bespeaking a consciousness of guilt." (Petition, p. 26). As the Fourth Circuit Court of Appeals correctly noted, such evidence is of little probative value in the absence of evidence linking Evans-Smith to the crime. (Petition, p. 24A n. 23). Furthermore, the Court quite properly noted that the vast majority of the evidence upon which Petitioner relies as evidence of guilty conscience is no such thing. (Id.) Petitioner's interpretation of that evidence involves nothing more than fantasizing guilty interpretations for thoroughly innocent conduct. Indeed, as the Court aptly noted, had Evans-Smith acted differently than he did, the prosecution "would no doubt have instanced the scenario as proof of mur-

der." (Petition, p. 13A n.12). The fact is that the Commonwealth would have found evidence of guilty conscience in whatever reactions Evans-Smith had or in whatever he had done. There was nothing unique or peculiar about the conduct of which the Petitioner complains, or about the questions he asked of the police, and certainly nothing which suggested atypical conduct by a former Special Forces' Colonel such as Evans-Smith.[24]

In its closing words, the Fourth Circuit Court of Appeals fairly summarized the fallacy of Petitioner's claims:

> ... Evans-Smith could no doubt have acted as the prosecution has contended he did. However, the suppositions are derived from acts of his

---

[24]Evans-Smith had a physical encounter with two sheriff deputies at his farm gate after an extended wait there to go up to the residence to see his wife's body the night of the murder. (Petition, pp. 13A and 24A).

> consistent with a husband's perfectly proper behavior mixed with imaginations of behavior for which his presence has not been proven.

(Petition, p. 29A).

The Court's ultimate conclusion that the evidence in the case against Respondent was insufficient to prove his guilt beyond a reasonable doubt is entirely consistent with existing case law and in no sense represents a departure from the well settled principles of Winship and Jackson. On the other hand, the result urged by Petitioner would represent a substantial diminution of the government's obligation to prove a defendant's guilt to a "virtual state of near certitude." Jackson, 443 U.S. at 315. It would allow the government to substitute wholesale speculation for evidence as proof of a defendant's guilt. *See, e.g.*, United States v. Menesses, 962 F.2d 420,

426-27 (5th Cir. 1992) (reversing a conviction that was "based on inference upon inference"); Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982). As the United States Eleventh Circuit Court of Appeals observed in Cosby:

> ...[Jackson] does not mean that whenever the record supports conflicting inferences, no matter how weak, the prosecution wins.... If Jackson's beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence ... reaches a certain degree of conjecture and speculation, then the defendant must be acquitted."

Id., 1383 & n.21.

What Petitioner argues is not the law now, and it should not be seriously considered by this Court.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that this

Court deny the issuance of the Writ of Certiorari requested by Petitioner.

Respectfully submitted,

*GERALD T. ZERKIN, VSB#16270
ANN B. VANCE, VSB#30008

GERALD T. ZERKIN, ESQUIRE
Linden Tower Professional Centre
2nd & Franklin Streets, Suite 505
Richmond, Virginia 23219
(804) 788-4412

ANN B. VANCE, ESQUIRE
29 North King Street
Leesburg, Virginia 22075
(703) 777-3434

* Counsel of Record

October, 1994 TERM

WILLIAM EVANS-SMITH
vs.
COMMONWEALTH OF VIRGINIA

No. 0079-86

COURT OF APPEALS OF VIRGINIA

361 S.E.2d 436, 5 Va. App. 188

October 20, 1987, Decided

Circuit Court of Loudoun County, Carleton Penn, Judge.

HEADNOTE

(1) Evidence -- Rulings on the Admission of Evidence -- Standard. -- The admissibility of evidence is a matter of law to be determined by the trial judge; evidence is admissible if it is both relevant and material.

(2) Evidence -- Relevance -- Standard. -- Evidence is relevant if it tends to establish the proposition for which it is offered; evidence is material if it relates to a matter properly at issue.

(3) Evidence -- Rulings on the Admission of Evidence -- Prejudice. -- Relevant evidence should be excluded if the prejudicial effect of the evidence outweighs its probative value; the fact that some prejudice may result does not justify automatic exclusion.

(4) Evidence -- Hearsay -- Standard. -- Hearsay is testimony which consists of a narration by one person of matters told him by another; the strongest justification for the exclusion of hearsay is that the trier of fact has no opportunity to view the witness on cross-examination and to observe the demeanor of the out-of-court declarant to determine reliability.

(5) Evidence -- Hearsay -- Defined. -- If a declaration is offered solely to show that it was uttered, without regard to the truth or falsity of its content, the declaration is not excluded by the hearsay rule, hearsay also is admissible if it falls into one of the recognized exceptions to the hearsay rule which are based on necessity and inherent trustworthiness.

(6) Evidence -- Hearsay -- State-of-Mind. -- The state-of-mind exception is one of the recognized exceptions to the hearsay rule; if the declarant's state of mind is relevant to the case, then admissions of the declarant's mental state are admissible, providing they refer to a presently existing state of mind and there is no obvious indication of falsification or contrivance.

(7) Evidence -- Materiality -- Standard. -- Matters which have no logical bearing upon the case are said to be immaterial and evidence tending to prove an immaterial matter is not admissible.

(8) Evidence -- Hearsay -- Admission. -- Remoteness is a factor to be weighed in determining the indicia of reliability to be accorded hearsay statements and in balancing the probative value of a statement against its prejudicial effect.

(9) Evidence -- Hearsay -- Res Gestae. -- The declarations of a person before his death, which are so connected with the act as to form a part of the same transaction, and which illustrate and explain the homicide, are admissible as part of the res gestae, but declarations or statements not constituting a part of the res gestae, and not made in the presence of the accused, are not competent evidence.

(10) Jury Trial -- Juror Misconduct -- Standard. -- Generally, the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct; the rationale for this rule is to avoid jury tampering, to discourage jurymen from changing their minds, to emphasize the importance and solemnity of the jurors' role, and to ensure the finality of verdicts.

(11) Jury Trial -- Juror Misconduct -- Standard. -- An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's right to be confronted with the witnesses against him.

(12) Jury Trial -- Juror Misconduct -- Standard. -- In considering a motion to set aside when juror misconduct is alleged, the trial court has the duty to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct; the trial court may properly summon one or more jurors to testify under oath in open court and to answer relevant questions propounded by the court and counsel about what has transpired.

(13) Jury Trial -- Juror Misconduct -- Standard. -- A motion for a new trial based on juror misconduct cannot be sustained on the juror affidavit alone; however such affidavits may provide sufficient cause to require the trial court to investigate the matters recited in the document.

(14) Jury Trial -- Juror Misconduct -- Standard. -- A juror may not properly receive any information about a case he is hearing except in open court and in the manner provided by law; however, the reception of such evidence is harmless error and will not be considered as grounds for setting aside the verdict unless there is sufficient reason to believe that an accused has been prejudiced by receipt of the information.

(15) Jury Trial -- Juror Misconduct -- Standard. -- The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced; if they might have been

prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded.

(16) Jury Trial -- Juror Misconduct -- Standard. -- The principle is well settled that a juror may not impeach a verdict solely upon his mental processes.

SYLLABUS

Defendant was convicted of second degree murder. He argued that the trial court erred in admitting hearsay testimony pursuant to the state-of-mind exception, erred in failing to set aside the verdict because evidence not admitted at trial was considered by the jury, erred in failing to set aside the verdict because of prejudicial and inaccurate closing argument by the prosecution, erred in failing to provide information to the defense disclosed to the court by the prosecution pursuant to his discovery motion, and that the evidence was insufficient to support the conviction.

The Court of Appeals reversed and remanded, holding that the trial court erred in admitting certain statements made by the victim and another prosecution witness. The Court also held that the trial court erred in failing to summon and examine the jurors to determine whether they were influenced by their consideration of extraneous information.

COUNSEL

Blair D. Howard, David H. Moyes (Howard & Howard; Moyes & Maggs, on briefs), for appellant.

Frank S. Ferguson, Assistant Attorney General (Mary Sue Terry, Attorney General, on brief), for appellee.

JUDGES

Koontz, C.J. Duff, J., and Hodges, J., concurred.

AUTHOR: KOONTZ

OPINION

{*191} William Evans-Smith (appellant) was convicted in a jury trial of second degree murder in violation of Code Sec. 18.2-32 and sentenced in accordance with the jury's recommendation to five years incarceration. On appeal, he argues that: (1) the trial court erred in admitting testimony pursuant to the state-of-mind exception to the hearsay rule; (2) the trial court erred in failing to set aside the verdict due to extraneous evidence not admitted at trial

which the jury considered in its deliberations; (3) the evidence was insufficient as a matter of law to support the conviction; (4) the trial court erred in failing to set aside the verdict due to prejudicial and inaccurate statements made by the Commonwealth's attorney during closing argument; and (5) the trial court erred in failing to provide defense counsel information which the Commonwealth's attorney provided the court pursuant to a pretrial discovery order for exculpatory evidence.

I. Facts

On April 15, 1985, between 4:00 and 8:00 a.m., appellant's wife, Barbara Evans-Smith, was murdered at the couple's rural home. Although the exact time of death was not established, the medical examiner concluded that Mrs. Evans-Smith

died thirty to sixty minutes after she had eaten breakfast.

{*192} Between 10:30 and 11:00 a.m., on April 15, Lesleigh Evans-Smith Cook arrived at her parents' home. Finding the outer doors unlocked, parts of the house in disarray, and receiving no response upon calling to her mother, Cook became alarmed and, using a CB car radio, summoned two friends. When they arrived, they discovered Mrs. Evans-Smith's semi-nude body in her upstairs bedroom. Her night clothes were ripped, giving the appearance of sexual assault. Her bedroom and appellant's bedroom had been ransacked, giving the appearance of a robbery. Downstairs, a hall table was overturned and some kitchen furniture had been moved. The rest of the house was undisturbed.

Mr. Evans-Smith was notified of his wife's death between 3:00 and 4:00 p.m. at his Washington office. He maintained then and at trial that his wife was alive when he left for work that morning shortly before 6:30 a.m.

Mr. Evans-Smith testified that he arose that day a few minutes before 5:00 a.m. as was his custom. He shaved, dressed in "barn clothes," and drove his car down the lane to get the newspaper. He testified that he drove with his headlights on because it was dark. On that morning, he testified that the beam of his headlights momentarily shone on a dark colored van that was parked on the opposite side of the road facing him. When he returned to the house, he parked the car in the garage and did his stable chores. He then returned to the house,

ate breakfast with his wife and read the paper. Afterwards, he showered and dressed for work. Evans-Smith testified that his wife waved good-bye to him from her bedroom window as he left for work. He testified that no verbal or physical confrontation occurred between them on April 15. He further testified that he arrived at his office after dropping off some books at about 8:10 a.m., and that he worked there until the police arrived at 3:45 p.m. to inform him of his wife's death.

II. The Hearsay Issue[1]

At trial, the thrust of the Commonwealth's case was that the Evans-Smiths' marriage was deteriorating

---

[1]For clarity, the germane facts are recounted in relation to the issue to which they pertain.

and unhappy. The Commonwealth attempted to show that in the year prior to Mrs. Evans-Smith's death, Mr. Evans-Smith had become increasingly {*193} hostile and depressed over troubles at his work, the unhappy ending of a long standing extramarital affair in August 1984, and his dissatisfaction with his marriage. These feelings of frustration and despair allegedly culminated in the murder of Barbara Evans-Smith. The Commonwealth attempted to show through the testimony of several witnesses that the victim was aware of the change in her husband's personality and that she was fearful of his increasingly volatile and hostile nature. The purported relevance of this evidence was that it would tend to prove motive and intent. Among the voluminous evidence presented was the testimony of

Duane Dean, Mary Pitz and Lesleigh Cook. In ruling on the admissibility of the evidence proffered by Dean, Pitz and Cook, the court stated that no testimony as to appellant's behavior or the victim's state of mind would be allowed prior to August 1984 due to the remoteness of the events. The court reasoned that the period after August 1984 was a crucial time as it was when William Evans-Smith's extramarital affair ended and his lover moved to California.

Duane Dean was voir dired and testified that she had known the Evans-Smiths for five years and that subsequent to August 1984, Barbara Evans-Smith told her outside of William Evans-Smith's presence that he "was getting... much testier." Dean stated that Mrs. Evans-Smith "was concerned,

very concerned and she felt that Bill [Evans-Smith] was becoming much more violent," and that on April 2, 1985, the victim told her that he was "often in a very bad mood [and there] was not the cooperation between them that there had been before."

Mary Pitz was voir dired and testified that she had been good friends with Barbara Evans-Smith for fifteen years. She stated that subsequent to August 1984, Mrs. Evans-Smith told her outside of William Evans-Smith's presence that he "was becoming more violent and easily upset." She also stated that on March 23, 1985, she and her husband were dining at the Evans-Smiths' when Mrs. Evans-Smith realized the oven was not on and she said, "Oh my God, the oven isn't on, and Bill will be angry...." She

proceeded to heat a casserole on top of the stove because, "Bill is going to be furious" and "I don't want any problem." Pitz also recalled an incident during December 1984 when the Evans-Smiths were leaving the Pitzes' house. Pitz stated that Mr. Evans-Smith yelled to his wife, who was talking with Mrs. Pitz at the {*194} front door, "Dammit, Barbara, come on or I'll push you in the pond...." Mrs. Evans-Smith said to Pitz: "You know, I think he would." On cross-examination Pitz acknowledged that they were standing "half a block" from the pond at the time of this exchange.

As to Pitz's testimony, the court ruled:

> The court is of the view that she may relate the kitchen incident to be shown personally to the decedent's state of mind. The court makes the same ruling respecting the

incident on the steps... the party during Christmas of 84.

The court concluded that all of the foregoing testimony was admissible pursuant to the state-of-mind exception to the hearsay rule. See C. Friend, The Law of Evidence in Virginia Sec. 238 (2d ed. 1983).

Both Dean and Pitz specifically acknowledged that they had never seen William Evans-Smith strike his wife and both testified that Mrs. Evans-Smith had never indicated to them that her husband had ever struck her.

Lesleigh Evans-Smith Cook was also called as a Commonwealth's witness to establish her mother's state of mind concerning Barbara Evans-Smith's fear of appellant. Cook was voir dired in the judge's chambers and during that examination stated that her father's

personality had changed "somewhat" since August 1984 and that her mother had noticed this change and discussed it with her outside of her father's presence. Cook stated that one day during the 1984 Christmas season, she telephoned her mother who seemed "very distressed," but would not discuss the problem on the telephone. When Cook arrived at her parents' house, her mother had been crying and told Cook, "Your father tried to kill me last night." However, Barbara Evans-Smith refused to discuss any of the specifics with her daughter. Cook also stated that her mother refused to discuss the basis of her opinion or conclusions on these matters.

Defense counsel argued to the court that the victim's statements to Cook, especially, "Your father tried to kill me

last night," were inadmissible because they were merely conclusions for which there was no factual basis which could be gleaned from the evidence. {*195} Furthermore, counsel argued that the statements were inadmissible because of their highly prejudicial and potentially devastating effect on Evans-Smith's defense. Counsel also contended that the statements were inadmissible because they were not made in Evans-Smith's presence and were not part of the res gestae. The Commonwealth's attorney argued that the testimony was admissible to show that the victim was fearful of her husband. He argued that Mrs. Evans-Smith had related only facts, not conclusions.

In ruling on Cook's proffered testimony, the trial court stated:

> I don't know how to cure the problem the court has with the statement of ["]your father tried to kill me last night["] because I think that is an opinion and as such is not admissible. However, I do think that the witness should be permitted to testify concerning the state of mind of her mother on that occasion. I think it should be linked to the conduct of the father without reference to the attempt to kill. It shows the state of mind of [Barbara Evans-Smith].[2]

The court further ruled that Cook's testimony would be allowed to show the victim's state of mind and not for the truth of the matter asserted and the court so instructed the jury.

---

[2]We note that the record of the judge's rulings refers to hearsay evidence being admitted as probative of the "decedent's" state of mind in some places and the "defendant's" state of mind in other places. However, the evidence was offered at trial for the purpose of showing Barbara Evans-Smith's state of mind and that is the issue the parties have briefed and argued on appeal. Accordingly, we shall not consider whether the hearsay was admissible as probative of appellant's state of mind. Rule 5A:18.

In open court, Cook testified that since August 1984 she had noticed that her father "was more easily angered" and stated that during the holiday season of 1984:

> I had telephoned my mother... and realized that she was upset so I went to the farm and she had been crying and I asked her what was wrong and at that time she related to me an incident between my mother and father that caused her to be fearful of my father.... She tried very hard to control her emotions but she was not able to... she was quite distraught and very hysterical.

{*196} Cook also stated that her mother told her sometime between Thanksgiving 1984 and New Year's 1985 that Evans-Smith struck her, but Cook could not recall the details of that conversation. She stated that her mother told her more than once during this period that she had experienced trouble sleeping because she was "afraid."

In this appeal, the Commonwealth argues that the hearsay testimony was admissible for two reasons: (1) to refute the position taken by the defense during opening statement and throughout the trial that the Evans-Smiths' marriage was harmonious; and (2) to establish that the victim was fearful of appellant. The Commonwealth argues that this evidence was probative of motive and intent and therefore admissible under the state-of-mind exception to the rule against hearsay. We disagree.

Initially, we note that opening statements are not evidence and therefore we reject the Commonwealth's argument that hearsay evidence allegedly probative of the victim's state of mind was admissible to rebut appellant's representations during opening statement.

See Fields v. Commonwealth, 2 Va. App. 300, 307, 343 S.E.2d 379, 382-83 (1986). While we recognize that the Commonwealth was entitled to present evidence of the Evans-Smiths' relationship, we conclude that on the facts of this case and for the reasons stated below, the evidence at issue was not admissible.

(1-3) The admissibility of evidence is a matter of law to be determined by the trial judge. Gottlieb v. Commonwealth, 126 Va. 807, 812, 101 S.E. 872, 874 (1920). Evidence is admissible if it is both relevant and material. "[E]vidence is relevant if it tends to establish the proposition for which it is offered." C. Friend, supra, Sec. 134. Evidence is material if it relates to a matter properly at issue. Id. However, relevant evidence should be excluded if

the prejudicial effect of the evidence outweighs its probative value. Id; see also Shepard v. United States, 290 U.S. 96, 104 (1933); Cumbee v. Commonwealth, 219 Va. 1132, 1138, 254 S.E.2d 112, 116 (1979); Edwards v. Syrkes, 211 Va. 600, 601, 179 S.E.2d 902, 903 (1971); Levine v. City of Lynchburg, 156 Va. 1007, 1014, 159 S.E. 95, 98 (1931). The fact that some prejudice may result does not justify automatic exclusion, however. C. Friend, supra, Sec. 136.

> {*197} [T]he court is not applying an absolute standard but is in fact always balancing the probative value of the evidence against the disadvantages (delay, confusion, prejudice, surprise, etc.) which may attend its admission. Each decision is made in light of the individual circumstances of the case, and the same evidence might well be admitted in one case and excluded in another because the balance struck between the factors is different in the two instances.

Id. at Sec. 135 (emphasis omitted).

(4-5) Hearsay is "testimony which consists [of] a narration by one person of matters told him by another." Williams v. Morris, 200 Va. 413, 417, 105 S.E.2d 829, 832 (1958). The strongest justification for the exclusion of hearsay evidence is that the trier of fact has no opportunity to view the witness on cross-examination and to observe the demeanor of the out-of-court declarant to determine reliability. C. Friend, supra, Sec. 224. However, "[i]f the declaration is offered solely to show that it was uttered, without regard to the truth or falsity of its content, the declaration is not excluded by the hearsay rule." Speller v. Commonwealth, 2 Va. App. 437, 446, 345 S.E.2d 542, 548 (1986) (citations omitted) (emphasis omitted). In addition, hearsay evidence

is admissible if it falls into one of the recognized exceptions to the hearsay rule which are based on necessity and inherent trustworthiness. C. Friend, supra, Sec. 230 et seq.

(6) The "state-of-mind" exception is one of these recognized exceptions. If the declarant's state of mind is relevant to the case, then admissions of the declarant's mental state are admissible, providing that they "refer to a presently existing state of mind" and there is "no obvious indication of falsification or contrivance." C. Friend, supra, Sec. 238; accord Karnes v. Commonwealth, 125 Va. 758, 764, 99 S.E. 562, 564 (1919); Johnson v. Commonwealth, 2 Va. App. 598, 602, 347 S.E.2d 163, 165 (1986).

For our analysis, we have categorized the testimony as follows: (a)

the victim's statements to Pitz, Dean and Cook concerning appellant's personality and the Evans-Smiths' relationship; (b) Cook's personal observations concerning appellant's personality and the Evans-Smiths' relationship; and (c) the kitchen and pond incidents related by Pitz.

{*198} a. The Victim's Statements to Dean, Pitz and Cook

(7) We first turn to the victim's statements to Dean, Pitz and Cook that appellant was becoming testier and more violent. We agree with appellant that the trial court erred in admitting these statements under the state-of-mind exception. We reach this result because we find the proposition for which they were offered was immaterial. Evidence is not admissible unless it is material to

the issues in the case. "Matters which have no logical bearing upon the case are said to be immaterial, and evidence tending to prove an immaterial matter is not admissible." C. Friend, supra, Sec. 134. For these statements to have been admissible, the victim's state of mind, in itself, must have been probative of an ultimate issue in this case. C. Friend, supra, Sec. 238. Here it was not. Whether Mrs. Evans-Smith feared her husband was probative of neither his motive or intent nor of the ultimate issue in the case, namely, whether William Evans-Smith murdered Barbara Evans-Smith. Certainly, had the appellant possessed motive or intent, either would have existed independent of the victim's fear of him or any other state of mind.

A victim's state of mind would be relevant in cases where the defense contends that the death was the result of suicide, accident or self-defense. In those cases, hearsay statements made by the victim illustrating his or her state of mind would be relevant, material and admissible. See Compton v. Commonwealth, 219 Va. 716, 729, 250 S.E.2d 749, 757 (1979)(evidence of prior relations existing between accused and victim relevant to issue of whether death was accidental); Parsons v. Commonwealth, 138 Va. 764, 781, 121 S.E. 68, 73 (1924) (statement of accused on the day of the murder that he was afraid of the victim relevant to material issue of self defense); Scruggs v. Commonwealth, 125 Va. 736, 743-44, 99 S.E. 518, 520 (1919) (evidence of victim's state of mind

relevant to material issue of whether death was result of suicide). Here, however, the defense did not contend that Mrs. Evans-Smith's death was the result of suicide, accident or self-defense. Therefore, these statements were immaterial and inadmissible.

Even if we were to hold that Barbara Evans-Smith's fear of her husband was material, we find that this evidence was not probative of fear, and therefore not relevant. The victim's statements {*199} that her husband was becoming testier and more violent may have indicated a strained and disagreeable relationship, but they did not tend to prove her fear of him. In fact, Mrs. Evans-Smith never told Pitz, Dean or Cook that she was afraid of her husband.

(8) Finally, these statements were conclusions with no factual support in the record which would tend to substantiate or corroborate them. The rationale for allowing hearsay, the inherent reliability of the statement, was absent here. Further, without more detail or examples it was impossible for appellant to rebut this evidence. We also find it significant that all of Mrs. Evans-Smith's statements to Cook, Dean and Pitz concerning the purported personality changes in her husband were made outside of appellant's presence. Clearly, appellant's defense was prejudiced by being faced with the near impossible task of rebutting opinions and conclusory statements made outside of his presence by an unavailable witness who could not be cross-examined. Furthermore,

the statements were made between August 1984 and New Year's 1985, some four to eight months before the victim's death. Remoteness is a factor to be weighed in determining the indicia of reliability to be accorded hearsay statements and in balancing the probative value of a statement against its prejudicial effect. See generally Jones v. Commonwealth, 202 Va. 236, 117 S.E.2d 67 (1960); Belton v. Commonwealth, 200 Va. 5, 104 S.E.2d 1 (1958). In excluding the victim's statement to Cook that, "Your father tried to kill me last night," the trial court correctly ruled that this constituted an inadmissible opinion. We believe the victim's other statements to her daughter and her friends were likewise inadmissible opinions.

For similar reasons, we hold that these statements were also inadmissible to rebut appellant's portrayal of the marriage as a happy one, as the Commonwealth argues. The statements were remote in time to the victim's death; they were hearsay and they were made outside of appellant's presence. Further, we do not believe that the statements were probative of appellant's view of the marriage. In summary, we believe their prejudicial effect outweighed any probative value.

Since these statements were not admissible pursuant to an exception to the hearsay rule and since the victim's fear was not a material issue, we find that these statements were offered for no other purpose than to show appellant's increasingly violent nature. {*200}

Although the jury was instructed that the testimony was to be considered only to illustrate Barbara Evans-Smith's state of mind, it is impossible to discern for what purpose the remarks were received by the jury.

In Shepard, the prosecution offered the hearsay statement by the victim, "Mr. Shepard has poisoned me," as a dying declaration at trial and it was admitted into evidence. The United States Supreme Court reversed and held the statement inadmissible as either a dying declaration or a state-of-mind exception to the hearsay rule. The Court's rationale was that the statement exceeded the bounds of proving the victim's state of mind and invaded the jury's province

of determining the ultimate issue.

Justice Cardozo stated:

> [The Government] did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her thoughts and feelings in times past. [The Government] used the declarations as proof of an act committed by [the victim's husband].... This... the Government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon [the victim's state of mind] and reject them to the extent that they charged the death to someone else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed.... When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

290 U.S. at 104 (citations omitted).

Because it is impossible to tell to what extent the jury was influenced by this prejudicial evidence, we hold that the

admission of these statements constituted reversible error.

(9) Our conclusion is supported by several Virginia cases dealing with statements of the victim in homicide cases. In Mullins v. Commonwealth, 113 Va. 787, 75 S.E. 193 (1912), the Supreme Court held as follows:

> The declarations of a person before his death, which are so connected with the act as to form a part of the same transaction, {*201} and which illustrate and explain the homicide, are admissible as part of the res gestae, but declarations or statements not constituting a part of the res gestae, and not made in the presence of the accused, are not competent evidence.

Id. at 789, 75 S.E. at 195.

Likewise in Belton, the trial court committed reversible error in admitting into evidence statements made by the victim two months prior to her murder and outside of the defendant's presence. A

witness in Belton testified that the victim stated as follows:

> [s]omeone was trying to break into her apartment at night; that on one occasion she had been awakened and found the accused standing over her bed; that she was afraid of the accused and had reported to the town authorities that he was going around town armed with a gun.

200 Va. at 7, 104 S.E.2d at 3.

Finally in Jones, the Supreme Court held that admission of the victim's statement made more than one month before her death and outside of the defendant's presence that she thought that the accused would kill her was prejudicial and reversible error. 202 Va. at 242, 117 S.E.2d at 72. The Commonwealth attempts to distinguish these cases by pointing out that the foregoing statements were not admitted pursuant to an exception to the hearsay rule. However, we are unpersuaded by this argument as we have

concluded that Mrs. Evans-Smith's state of mind was immaterial and, therefore, that the state-of-mind exception was inapplicable. Accordingly, we find that the victim's statements were inadmissible to prove the appellant's intent. C. Friend, supra, Sec. 238.

Additionally, the statements were also inadmissible to prove motive. In Scruggs, to establish the motive for the murder the Commonwealth introduced a statement made by the victim that the defendant owed her money. The Supreme Court found the admission of this evidence to be reversible error, stating: "[M]otive can no more be proved by hearsay evidence than any other fact." 125 Va. at 746, 99 S.E. at 521.

{*202} b. Cook's Personal Observations

We now address Cook's personal observations concerning appellant's personality and the Evans-Smiths' relationship. Cook testified that between August 1984 and the time of trial in August 1985 that she had noticed that her father "was more easily angered." She also described her mother as being "distraught," "hysterical," "depressed," and "fearful" during the 1984 holiday season. At the outset we note that Cook's personal observations of her mother are not hearsay. Lay witnesses may testify to "changes in physical conditions observed from time to time by the witness." C. Friend, supra, Sec. 210. Lay witnesses may opine that a person is "ill," "suffering," or "nervous." Id. (footnotes omitted). In our view, however, the prejudicial effect of this evidence

outweighed its probative value and the evidence should have been excluded. While this evidence may have been probative of Barbara Evans-Smith's state of mind, the fact that her state of mind was not material, together with the potentially detrimental effect of this evidence on appellant's case, compelled its exclusion. First, these observations occurred four to seven months prior to the murder and were, thus, remote in time. Although the evidence tended to explain the Evans-Smiths' relationship, it was not necessarily probative of fear, and thus, its probative value was far outweighed by its prejudicial nature. See Cumbee, 219 Va. at 1138, 254 S.E.2d at 116. Further-more, because Barbara Evans-Smith's state of mind was not itself a material issue, this evidence

served only to mislead the jury and to arouse their hostility towards appellant.

c. The Pond and Kitchen Incidents

Finally, we address the pond and kitchen incidents as related by Pitz. We believe that this testimony also should have been excluded. First, the victim's state of mind was not a material issue. Even if state of mind were an issue, we believe it was impossible for the jury to have followed the court's instructions to receive the testimony only as it related to the victim's state of mind. Because we cannot say to what extent the jury was influenced by this testimony, we hold that its admission was reversible error. Furthermore, even if the victim's fear had been a material issue, this evidence should have been excluded due to its inflammatory nature and the fact that

these incidents were not probative of the victim's fearful state of mind. To the contrary, there is such a wide range {*203} of inferences that flow from these incidents that we believe it was reversible error to have admitted them as evidence of the victim's state of mind. The pond incident occurred in December 1984, four months before the victim's death. It was just as likely that Evans-Smith was joking, impatient or mildly irritated as it was evidence of a violent nature which would have made his wife fearful. Likewise, her response was susceptible to many interpretations other than fear, such as sarcasm, amusement or even indifference. Furthermore, he was "half a block" from the pond at the time of the exchange and never attempted to act on his remark. Similarly, the kitchen

incident does not tend to show the victim's fear of her husband. It was just as likely probative of the everyday tensions of married life or concern with being a proper host and hostess. It is impossible to determine the context in which these remarks were made and any connection between these remarks and the victim's state of mind was tenuous at best. We believe that the admission of statements such as these is a dangerous policy and on the facts of this case, was error.

Furthermore, we believe that the admission of all of the foregoing evidence cannot be deemed harmless because the circumstantial evidence of appellant's guilt aside from this evidence was "not so overwhelming as to establish the guilt of the accused beyond

a reasonable doubt." Harryman v. Estelle, 616 F.2d 870, 876 (8th Cir.), cert. denied, 449 U.S. 860 (1980).

III. Juror Misconduct Issue

At trial, the defense contended that Mrs. Evans-Smith was killed by intruders during a rape-robbery attempt. To this end, appellant testified that he had seen a suspicious looking dark colored van parked 300 to 400 feet away on the road in front of his driveway when he retrieved the newspaper shortly after 5:00 a.m. on April 15. He noticed the van because the beam from his headlights was reflected by it. A witness, Tracy Dillon, testified that about 8:30 a.m. on April 15, a green van with Louisiana license plates pulled out in front of her on a road near the Evans-Smiths' house. She reported the incident to the police

because the van pulled out very abruptly and would not let her pass. In addition, defense counsel also presented evidence that tire tracks were seen in a hay field 200 to 300 feet away from the victim's house. Evidence was also introduced that two horsetrainers from a commercial {*204} race track in West Virginia were working at a neighboring farm on the morning of the murder. The defense attempted to implicate these men as Mrs. Evans-Smith's assailants.

Four days after the jury rendered its verdict, juror Christine Nelson disclosed to defense counsel that another juror had consulted an almanac outside of the jury room and had discussed his findings inside the jury room during jury deliberations. According to Nelson, the juror checked the time of sunrise on

April 15, 1985, to determine whether appellant was telling the truth. The almanac revealed that the sun had already risen at the time appellant testified he turned on his headlights. Nelson stated that she had voted "not guilty" in the two votes that were taken during the first four days of deliberation, but after she evaluated this information (which she alleged was discussed in the jury room on the fifth day of deliberations) and, after the other jurors told her that if sentenced to five years Evans-Smith would serve only one, Nelson changed her vote to "guilty."

Defense counsel made a post trial motion to set aside the verdict based on juror misconduct. The trial court initially refused defense counsel's offer

of juror Nelson's testimony and her affidavit, stating:

> [T]his Court I think must base its decision on your motion with what it deems to be the law of the Supreme Court of Virginia. Your motion to have this affidavit received in evidence and to put this juror on the witness stand is denied.

However, the court allowed defense counsel to vouch the record with her testimony and affidavit. Additionally, the Common-wealth's attorney cross-examined Nelson.

Upon a motion to reconsider, the court reversed itself and received Nelson's affidavit (but not her

testimony)[3] as well as seven {*205} identical affidavits from other members of the jury offered by the Commonwealth. These affidavits essentially rebutted Nelson's. The affidavits conceded that

---

[3]Appellant states on brief: "Although the trial judge in the Evans-Smith case did reconsider and receive testimony on the question of extraneous information, he made no determination as to whether this evidence was prejudicial or even whether it might have prejudiced the defendant under the Brittle 'test.' The trial judge simply reasoned that it was improper to impeach a juror's vote." Our examination of the record shows this to be an incorrect account. The trial court initially refused to consider Nelson's affidavit or testimony, but allowed defense counsel to proffer them to the court. Later, the court received Nelson's affidavit, but not her testimony. The court then decided to receive the other seven affidavits, but refused to hear the testimony of any jurors. Thus, the court never actually considered testimony of any of the jurors. Even though Christine Nelson's testimony appears in the record, it was simply a proffer. For this reason we have addressed this issue as follows: (1) whether the trial court erred in failing to summon and examine the jurors; and (2) whether the trial court erred in failing to set aside the verdict.

the jury had discussed the almanac information, but each of the seven jurors stated he or she was not influenced by the information. They further stated that the jury vote was eleven to one in favor of guilt both before and after the almanac information was revealed and that a unanimous vote of guilty was not reached until the fifth day of deliberations after the jury had been given the Allen charge. These jurors stated that the almanac discussion occurred on the fourth day of deliberations and not on the fifth as Nelson alleged and they also denied that the verdict was a "quotient" verdict. The trial court refused to recall the jurors and question them in open court. In denying the motion to set aside the verdict, the trial court judge reviewed

the applicable case law and quoted Bull v. Commonwealth, 55 Va. (14 Gratt.) 613, 633 (1857) as follows:

> The verdict is surely the best evidence of [a juror's] opinion of the case; and he at least should not be permitted, as a general rule, to impeach it.... The jury may be polled, and ought to be, if there is the least doubt of the free concurrence of all the jury in the verdict.... Is it not more reasonable that this easy legal precaution should be used, than that affidavits should be obtained of the jurors after their discharge, and made the foundation of a motion for a new trial? Again: the court, if not satisfied with the verdict, may and might set it aside. And if it improperly refuse to do so, the appellate court may revise and reverse the judgment.

On appeal, appellant argues that the trial court erred in failing to set aside the verdict where the jury considered extraneous evidence not presented in open court and where appellant was effectively denied his sixth amendment right to confrontation.

The Commonwealth argues that the jury's consideration of the almanac information was not improper because it was a proper {*206} subject matter for judicial notice and it was correct. The Commonwealth urges us to extend the court's power of judicial notice to the jury. Furthermore, the court was correct in its original decision to refuse affidavits and testimony because, the Commonwealth asserts, such evidence is not admissible to impeach a jury verdict. Presentation of affidavits and testimony is proper only in a case where the alleged taint arose from external forces outside of the jury. Finally, the Commonwealth notes that this matter was within the court's sound discretion and should not now be disturbed because appellant has not shown an abuse of

discretion. For the reasons stated below, we disagree.

(10-12) Generally, "the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct." Bull, 55 Va. (14 Gratt.) at 632; accord Caterpillar Tractor Co. v. Hulvey, 233 Va. 77, 82, 353 S.E.2d 747, 750 (1987); see also Commercial Union Ins. Co. v. Moorefield, 231 Va. 260, 265, 343 S.E.2d 329, 333 (1986). The rationale for this rule is to avoid jury tampering, to discourage jurymen from changing their minds, to emphasize the importance and solemnity of the jurors' role, and to ensure the finality of verdicts. However, there is strong public policy and legal precedent which mandates the interrogation of jurors to determine if

an impropriety has tainted the verdict. "An exception to the general rule limiting post-verdict examination of jurors is recognized when it appears that matters not in evidence may have come to the attention of one or more jurors so as to violate the defendant's constitutional right to be confronted with the witnesses against him." 19 Michie's Jurisprudence Verdict Sec. 34 (Repl. Vol. 1979).

> In considering a motion to set aside when juror misconduct is alleged, the trial court has the affirmative duty "to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct." Kearns v. Hall, 197 Va. 736, 743, 91 S.E.2d 648, 653 (1956). The trial court may properly summon one or more jurors to testify under oath in open court and to answer relevant questions propounded by the court and counsel about what had transpired. Dozier v. Morrisette, 198 Va. 37, 40, 92 S.E.2d 366, 368 (1956). This is an exception to the general rule that testimony of jurors is inadmissible to impeach their verdict. Id., 92 S.E.2d at

> 368. Ordinarily, jurors will not be allowed "to {*207} explain their verdict by stating the reasons upon which their conclusions are based." Federal Deposit Insurance Corp. v. Mapp, 184 Va. 970, 983, 37 S.E.2d 23, 28 (1946).

Commercial Union Ins. Co., 231 Va. at 265, 343 S.E.2d at 333 (emphasis added); see also Haddad v. Commonwealth, 229 Va. 325, 330, 329 S.E.2d 17, 20 (1985).

Historically, courts have been more willing to examine allegations of juror misconduct which originate in sources outside of the jury. A juror who himself alleges the misconduct of a jury on which he has served is subject to particular scrutiny and is treated with great caution. See, e.g., Bull, 55 Va. (14 Gratt.) at 632-33.

(13) A motion for a new trial based on juror misconduct cannot be sustained

on juror affidavits alone. However, such affidavits may provide "sufficient [cause] to require the trial court to investigate the matters recited in the document." Commercial Union Ins. Co., 231 Va. at 265, 343 S.E.2d at 333 (citations omitted); see also Kearns v. Hall, 197 Va. at 741-42, 91 S.E.2d at 652. Accordingly, when the information disclosed in the jurors' affidavits indicates that injustice probably occurred, the trial court has an affirmative duty to further investigate whether juror misconduct occurred. Commercial Union Ins. Co., 231 Va. at 265, 343 S.E.2d at 333.

(14-15) As we have recognized, "[a] juror may not properly receive any information about a case he is hearing except in open court and in the manner

provided by law." Brittle v. Commonwealth, 222 Va. 518, 522, 281 S.E.2d 889, 890 (1981)(citing Crockett v. Commonwealth, 187 Va. 687, 706, 47 S.E.2d 377, 386 (1948)); accord Hinton v. Gallagher, 190 Va. 421, 432, 57 S.E.2d 131, 136 (1950). However, the reception of such evidence, aliunde, is harmless error and will not be considered as grounds for setting aside the verdict unless "there is sufficient ground to believe that... an accused... has been prejudiced by receipt of the information." Brittle, 222 Va. at 522, 281 S.E.2d at 890 (citations omitted); accord Crockett, 187 Va. at 705-06, 47 S.E.2d at 386.

> The test in a criminal case is not whether the jurors were actually prejudiced by the extraneous matter, but whether they might have been so prejudiced. If they might have been prejudiced, then the purity of the

> verdict is open to serious doubt and the verdict should be set aside and a new trial {*208} awarded.

Thompson v. Commonwealth, 193 Va. 704, 715, 70 S.E.2d 284, 290 (1952) (citations omitted); accord Brittle, 222 Va. at 522, 281 S.E.2d at 890. Furthermore, "only slight evidence of influence or prejudice...should be required to warrant the granting of a new trial." Crockett, 187 Va. at 705, 47 S.E.2d at 386 (citations omitted).

Against this background, we turn to the present facts to determine whether the trial court erred in denying appellant's motion to set aside the verdict. Initially, we hold that it was improper for a juror to have consulted an almanac outside of the jury room to determine the time of sunrise on April 15 and to have discussed this matter in the

jury room during deliberations. "It is always improper for a juror... to receive any information about [a cause] except in open court and in the manner provided by the law...." Crockett, 187 Va. at 706, 47 S.E.2d at 386 (citations omitted). We are not persuaded by the Commonwealth's contention that the almanac information was a proper subject matter for the jury's consideration simply because an almanac report of sunrise is a proper subject matter for judicial notice. Virginia courts have not extended this privilege to the jury and we decline to take this opportunity to do so. See C. Friend, supra, Sec. 287. We further note that the time of sunrise contained in an almanac is not the equivalent of common sense, knowledge, and experience upon which a juror may rely. Id. We also

decline to accept the Commonwealth's contention that the almanac information was not offensive because it was true. It is simply impossible to determine the truth of such information absent its being received as evidence in open court and subject to cross examination.

We also must determine whether the trial court erred in refusing to summon and examine the jurors to determine whether misconduct occurred, and if so, the effect of that misconduct. Preliminarily, we note that we support the judicial policy of treating with particular wariness and scrutiny a dissident juror who comes forth to identify juror misconduct. We believe, however, that this case merited further inquiry by the trial court because the misconduct alleged by Nelson was

corroborated by seven of the eleven other jurors. The trial court concluded after evaluating all eight affidavits and applicable case law that Christine Nelson's affidavit and {*209} the seven other affidavits were insufficient "to serve as the basis for the granting of a new trial in this case." The court's rationale was that Nelson's affidavit did not state a sufficient claim of jury misconduct which would allow her to impeach the verdict. The court determined that her affidavit "states a conclusion only... but states no specific fact such as the hour of sunrise in a given geographical location.... Most importantly, the affidavit of Nelson contains a recitation of mental processes concerning how she reached that verdict."

(16) The principle is well settled that a juror may not impeach a verdict solely upon his mental processes. See Downey v. Peyton, 451 F.2d 236, 239 (4th Cir. 1971); Washington Luna Park Co. v. Goodrich, 110 Va. 692, 698, 66 S.E. 977, 979 (1910) (citations omitted); Bull, 55 Va. (14 Gratt.) at 632; 19 Michie's Jurisprudence Verdict Sec. 34 (Repl. Vol. 1979). Here, however, the alleged misconduct was not the jurors' mental processes, but the evidence, aliunde, which may have influenced their mental processes. When there is a probability that such external evidence has influenced the jury, the court has "the affirmative duty 'to investigate the charges and to ascertain whether... as a matter of fact, the jury was guilty of such misconduct.'" Commercial Union Ins.

Co., 231 Va. at 265, 343 S.E.2d at 333 (quoting Kearns v. Hall, 197 Va. at 743, 91 S.E.2d at 653). Accordingly, we hold that the affidavits proffered to the court and made a part of the record warranted further investigation by the court.

In this regard, we hold that the trial court erred as a matter of law in concluding that no further investigation concerning the almanac information was warranted. Implicit in the court's decision that the affidavits were insufficient "to serve as the basis for the granting of a new trial in this case," was the conclusion that no probability of prejudice arose from the almanac information. The trial court also noted: "[N]o almanac will tell you whether it was daylight at a given hour.

It only gives sunrise.... Knowing when the sun rises under the facts of this case, it being very early in the morning, the hour of sunrise is not conclusive of whether it was daylight or dark." We disagree.

We conclude that the probability of prejudice to the appellant flowing from the jury's consideration of the almanac information was great because the purpose for which the evidence, aliunde, was considered went to an ultimate issue in the case. The juror {*210} consulted the almanac to determine whether appellant was lying about seeing a mysterious van parked near his home on the morning of his wife's murder. Evans-Smith's entire defense rested on the theory that his wife was murdered during a rape and robbery attempt by intruders in a van.

Whether the jury believed Evans-Smith's testimony that a van was parked just outside his driveway was paramount in determining the ultimate issue of guilt or innocence in this circumstantial evidence case. The very essence of Evans-Smith's case was his credibility and veracity. For this reason we believe that it was absolutely essential that appellant be given an opportunity to confront and cross-examine this evidence against him.

We also find the circumstances surrounding the jury's deliberations and the jurors' affidavits strongly indicative of probable misconduct and prejudice which would warrant further investigation. The jury began its deliberations on Monday, August 26, 1985. They deliberated on Monday afternoon,

August 26, all of Tuesday, August 27, Wednesday, August 28, and Thursday, August 29. The almanac information was allegedly considered on Wednesday or Thursday. On Friday morning, August 30, the day the long Labor Day weekend began, the foreman informed the court that the jury was deadlocked. The court then delivered the Allen charge to the jury and urged them to reach a verdict. At 4:40 p.m., the jury returned with a verdict of guilty. As to the jurors' affidavits, we note that four jurors expressed no opinion by way of affidavit as to the almanac information. Clearly, the testimony of these four jurors, as well as the remaining eight, was necessary to determine whether the jurors might have been prejudiced.

Therefore, we conclude that the trial court erred as a matter of law in failing to summon and receive testimony from all of the jurors in order to determine whether the jurors might have been influenced by the consideration of the extraneous almanac information. Accordingly, we need not reach the question whether the trial court erred in failing to set aside the verdict. Further, since we are remanding this case for retrial, it is not necessary that we remand this case to the trial court for further inquiry into the jurors' potential prejudice.

{*211} IV. Other issues

Appellant also argues that the trial court erred in failing to set aside the verdict due to prejudicial and inaccurate statements made by the Commonwealth's

attorney during closing argument and that the trial court erred in failing to provide defense counsel with certain allegedly exculpatory evidence supplied to the court by the Commonwealth's attorney. Appellant further argues that the evidence was insufficient to support the conviction. However, since we reverse and remand for a new trial based on the hearsay and juror misconduct issues, and since we do not know whether these issues will arise upon retrial, and if so, in what factual context, we find that it is not necessary to decide these issues at this time and we decline to do so.

In summary, we conclude that the trial court erred in admitting certain statements made by the victim pursuant to the state-of-mind exception to the hearsay rule, and we find that the court

erred in admitting certain observations made by Lesleigh Cook. We further find that the trial court erred in failing to summon and examine the jurors to determine whether they may have been influenced by their consideration of the extraneous almanac information. For these reasons, the conviction is reversed and the case is remanded for a new trial, if the Commonwealth be so advised.

Reversed and remanded.

(Re: Letter opinion of Judge James H. Chamblin, reflecting court's denial of Respondent's State habeas corpus petition regarding exculpatory evidence)

VIRGINIA:

IN THE CIRCUIT COURT OF LOUDOUN COUNTY

WILLIAM EVANS-SMITH Petitioner	)	
vs.	)	LAW NO. 13577
JOHN B. TAYLOR, WARDEN STAUNTON CORRECTIONAL CENTER	)	(Petition for Writ of Habeas Corpus
Respondent	)	

SUMMARY OF RULING ON PETITION FOR WRIT OF HABEAS CORPUS

As set forth in detail under Findings of Fact and Conclusions of Law, the Amended Petition for Writ of Habeas Corpus is denied and dismissed for the following reasons:

(1) Even if the information given to Investigator Jay Merchant ("Merchant") by Karen Spalding ("Spalding") on the

morning after the murder is considered after- discovered evidence, no relief is available under Fitzgerald vs Bass, 6 Va. App. 38 (1988) because after-discovered evidence does not constitute a basis for habeas relief;

(2) The information given to Merchant by Spalding is clearly exculpatory evidence, but under United States vs. Bagley; 105 S.Ct. 3375 (1985) such evidence is not material; and

(3) The information given by Spalding to Merchant is exculpatory evidence coming under the doctrine of Brady vs. Maryland, 83 S.Ct. 1194 (1963) and its progeny and is not evidence, potentially useful to the defense but lost due to the bad faith of the police, under the doctrine of Arizona vs. Youngblood, 109 S.Ct. 333 (1988).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a jury trial this Court on August 11, 1989, sentenced the Petitioner William Evans-Smith ("Petitioner" or "Evans-Smith") consistent with the jury verdict to 20 years in the penitentiary on a conviction of second degree murder of his wife, Barbara Evans-Smith ("Barbara"). The Petitioner's petition for direct appeal was denied by the Court of Appeals on June 1, 1990 and by the Supreme Court of Virginia on September 14, 1990.

On May 14, 1992 Evans-Smith filed herein a petition for writ of habeas corpus attacking his conviction on the basis of what he alleges as newly discovered material exculpatory evidence not disclosed to him prior to trial. The evidence concerns statements made to

Investigator Jay Merchant ("Merchant") ofthe Loudoun County Sheriff's Department by Karen Spalding ("Spalding") the morning following the murder about a person she had seen walking on the road near the gate to the Evans-Smith farm where Barbara had been murdered.

As a result of a hearing herein on July 8, 1992 on the Respondent's Motion to Dismiss the original Petition, the Court allowed the Petitioner to amend his petition. He filed an Amended Petition on July 29, 1992, to which the Respondent filed an Answer on September 8, 1992. The Amended Petition alleges that the Spalding statements are both material exculpatory and after-discovered evidence, but if they are not deemed such, then they are potentially useful evidence lost due to the bad faith of

the police under Arizona v. Youngblood, 109 S.Ct. 333 (1988).

On September 21, 1992 this Court set a hearing to determine what information was given to Merchant by Spalding and whether the facts concerning Spalding's report to Merchant were available to Evans-Smith so as to have been included in his prior habeas corpus proceeding. The hearing was held on January 12, 1993.

I. FINDINGS OF FACT

A. Spalding Report

As a part of the investigation of the murder, Merchant conducted a "road check" on Route 725 near the Evans-Smith farm early on the morning of Tuesday, April 16, 1985. At the time Merchant knew that Barbara had been murdered in the residence on the farm the previous day (April 15, 1985), and had been told

by Dr. George Hocker, the Loudoun County Medical Examiner, that he estimated her time of death to have been 6:00 to 6:30 A.M. give or take one to two hours. Merchant arrived for the "road check" at about 4:30 A.M. and stayed until about 8:30 A.M.

During the "road check" Merchant stopped every vehicle to determine if anyone saw or heard anything at the time the murder occurred. He stopped a total of 22 vehicles, and he made notes concerning each vehicle he stopped. The notes were made in a spiral bound notebook. He made notes at the time he spoke to the occupants of each vehicle he stopped. He identified the notebook at the hearing, but the notebook itself was not admitted into evidence.

Karen Spalding and her family were living in April 1985 at a house on Route 725 a short distance east of the Evans-Smith farm. The Spalding family was living there temporarily while their fire damaged house near Purcellville was being repaired. Spalding's daughter attended Lincoln Elementary School in Lincoln, Virginia, which is west of the Evans-Smith farm.

The morning of April 16, 1985 Spalding was driving her daughter to school when she was stopped on Route 725 near the Evans-Smith property by Merchant. She was headed west on Route 725 toward Lincoln Elementary School when she was stopped at 7:36 A.M. He asked and obtained from Spalding her name, address and telephone number. He

asked her how often she travelled Route 725 and on what days. She told him that she usually came by about 8:00 A.M. taking her daughter to school. He told her that there had been a murder and asked if she had seen or heard anything. She replied negatively. He gave her his card and asked her to call him if she knew anything. Merchant made contemporaneous notes of his stops of Spalding (Respondent's Exhibit 2).

Spalding worked in McLean, Virginia in April 1985. She proceeded to work after dropping off her daughter at school. She had to be at work by 9:00 A.M. Sometime after the stop, but the same day, Spalding remembered having seen someone walking on Route 725 near the Evans-Smith farm. She called and left a message for Merchant to call her. Later

the same day Merchant returned the call to her.

In the telephone conversation Spalding told Merchant that on the previous Thursday or Friday she saw a person walking on Route 725 toward Lincoln near the Evans-Smith farm at about 8:00 A.M. She told him that it was a white male wearing a jean jacket, jeans and a baseball hat. She said he was in his late 20's or early 30's and had a reddish-brown beard. Merchant told her that someone would get back in touch with her, but no one ever did. Merchant made contemporaneous notes of this conversation (Respondent's Exhibit 4).

Merchant made his notes of both the stop and the telephone conversation in the same notebook. He had notes of all 22 vehicle stops of which Spalding's stop

was the tenth. On the next page of the notebook after the notes of the twenty-second stop are Merchant's notes of his telephone conversation with Spalding.

Although Spalding talked with her husband the evening of April 16., 1985 about these events, she did not discuss them with anyone other than him until May 1992. In November 1991 Spalding went to work for the law firm of David H. Moyes, one of the attorneys who had represented Evans-Smith at trial. In May 1992 during a discussion with a co-worker at the law firm Spalding mentioned the events of April 16, 1985. As a result, this information was provided to present counsel for the Petitioner and led to the filing of this habeas petition.

Spalding does not know Blair D. Howard, the other attorney who

represented the Petitioner at trial, and she does not know the Petitioner.

B. Proceedings Before Trial

Evans-Smith was directly indicted only eight days after the murder. He was released on bond. Because he was indicted directly, Evans-Smith did not have the benefit of a preliminary hearing. He remained free on bond until the jury at his second trial found him guilty on April 27, 1989. The Petitioner has been in custody since that date.

On May 3, 1985 defense counsel filed a discovery motion which included in paragraphs 2 and 3 thereof requests for exculpatory evidence under Brady vs. Maryland, 83 SCt. 1194 (1963)(Petitioner's Exhibit 4).

A hearing was held before Judge Carleton Penn on May 16, 1985 which

concerned the defense discovery motion. From the representations of defense counsel to the Court at the hearing the Commonwealth was clearly aware that the defense knew that the Commonwealth had interviewed over fifty persons; that the defense's investigation indicated that some of those persons has stated things that would not support the Commonwealth's theory of the case; that the defense was aware that the Commonwealth's case was entirely circumstantial; that the defense's theory was that person or persons other than Evans-Smith committed the murder; that the defense saw that the Commonwealth's investigation had narrowly focused only on Evans-Smith; and that the defense needed to follow up on exculpatory evidence right away.

As a result of that hearing the Court ordered the Commonwealth to produce exculpatory evidence, and ordered further that if there was any doubt as to whether or not evidence was exculpatory, then it shall be presented to the Court for in camera inspection. See order entered 23 May 1985, Petitioner's Exhibit 6. It was to be a continuing order. The Court asked the Commonwealth to file its theory of the case confidentially with the Court to be used by it in inspecting any statements in camera.

On May 16, 1985 trial was set to commence on August 13, 1985.

The Commonwealth filed a written discovery response on May 23, 1985 which produced statements of the Petitioner, but not anyone else (Petitioner's

Exhibit 7), and an "Answer to Motion for Exculpatory Evidence" which stated:

> "None known to the Commonwealth at this time."
>
> "Pursuant to Court order all witness statements will be presented to the Court for in camera inspection." (Petitioner's Exhibit 8).

The Petitioner had hired his own private investigators to help him in his defense. The defense acquired information that two individuals has provided the Commonwealth with the reports of suspicious incidents close in time and place to the murder. As a result, a further discovery motion was filed on August 2, 1985 (Petitioner's Exhibit 9).

A hearing was held before Judge Penn on August 5, 1985. He considered it to be an in camera pre-trial conference and excluded the public. Before the hearing

Judge Penn had received from the Commonwealth its theory of the case as well as certain data of the knowledge of witnesses that could arguably be exculpatory. When Mr. Howard raised the issue of the defense's desire to have the Commonwealth produce "any reports regarding suspicious activity of vehicles and persons" (Transcript page 24, Petitioner's Exhibit 10), Judge Penn immediately went into reviewing approximately ten written reports of statements of persons previously supplied by the Commonwealth for in camera inspection. The Court ruled all the reports to be exculpatory and gave them to the defense. At least one of the statements concerned suspicious events that occurred approximately two weeks prior to the murder (the "Gefaell

Statement" - see page 2 of Petitioner's Exhibit 12).

Defense counsel brought up other information that had come to their attention about suspicious activity and its being reported to the Sheriff's Department. Judge Penn suggested that the defense ask for a subpoena duces tecum directed to the Sheriff's Department. The defense followed his suggestion.

On August 8, 1985 a hearing was held before Judge Penn on the petitioner's request for a subpoena duces tecum to the Sheriff's Department for reports of suspicious vehicles and persons from March 15, 1985 to April 20, 1985. At the hearing Judge Penn ordered the production of all memoranda concerning statements made by Tracy Dillon and Elaine Monroe

for in camera inspection and that the subpoena duces tecum be issued in usual form returnable the first day of trial, August 13, 1985.

Evans-Smith's first trial commenced August 13, 1985. On August 30, 1985 the jury found him guilty of second degree murder and fixed his punishment at five years in the penitentiary. He was sentenced, but his conviction was reversed by the Court of Appeals on October 20, 1987. Evans-Smith vs. Commonwealth, 5 Va. App. 188 (1987).

The Commonwealth decided to retry Evans-Smith. On January 11, 1988 the Petitioner filed a discovery motion which included a request for exculpatory evidence under Brady. (Petitioner's Exhibit 14). On January 21, 1988 the

Commonwealth filed a written response stating:

> "The Commonwealth is unaware of any evidence subject to the rules of discovery which was not provided or made known to the defense either prior to during the first trial of this case."

(Petitioner's Exhibit 15).

The Commonwealth filed two supplemental discovery responses (Petitioner's Exhibits 16 and 17) but each concerned only statements of the Petitioner.

This Court granted a suppression motion filed by the Petitioner. The Commonwealth appealed, and the Court of Appeals reversed. After the delay caused by this appeal, the second trial started on April 17, 1989. The jury returned its verdict on April 27, 1989.

At no time did the Commonwealth reveal to the Petitioner or any of his

attorneys the existence of Spalding's statements to Merchant on April 16, 1985. At no time did the Commonwealth produce any memorandum or notes of her statements to the Court for in camera inspection and ruling. Evans-Smith did not learn of Spalding's statements until May 1992.

II. CONCLUSIONS OF LAW

A. After Discovered-Evidence Claim

The petitioner argues that he is entitled to habeas relief because the statements and observations of Karen Spalding constitute after-discovered evidence. Assuming that such could be construed as after-discovered evidence under the four-part test recently reiterated in Carter v. Commonwealth, 10 Va. App. 507, 512 (1990), after-discovered evidence does not constitute a basis for habeas relief. Fitzgerald vs. Bass, 6 Va.

App. 38, 46 (1988). Very simply, the purpose of a habeas proceeding is not to determine the petitioner's guilt or innocence but to test the legality of his incarceration.

All relief requested by the petitioner in this proceeding on account of or based upon after-discovered evidence is denied.

B. Material Exculpatory Evidence Claim

In Brady vs. Maryland, 83 S.Ct. 1194 (1963) the United States Supreme Court held that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment. Implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial.

United States v. Agurs, 2392, 2397 (1976).

Borrowing upon the standard imposed in cases involving incompetence of defense counsel announced in Strickland vs. Washington, 104 S.Ct. 2052 (1984), the United States Supreme Court in United States vs. Bagley, 105 S.Ct. 3375 (1985) held:

> We find the Strickland formulation of the Agurs test for materiality sufficiently flexible to cover the "no request," "general request," and "specific request" cases of prosecutorial failure to disclose evidence favorable to the accused: The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

The Bagley approach has been adopted by the Virginia Supreme Court, Correll vs. Commonwealth, 232 Va. 454 (1987), and

the Virginia Court of Appeals, Carter vs. Commonwealth, 10 Va. App. 507 (1990).

In order for Evans-Smith to be granted habeas relief this Court must find that (1) the Spalding statements to Merchant constitute exculpatory evidence and (2) the exculpatory evidence is material. For the reasons set forth below, this Court finds:

(1) that the information reported by Spalding to Merchant is clearly exculpatory evidence, but

(2) that under the Bagley approach such evidence is not material.

(1) Exculpatory Nature of the Spalding Report

As early as May 16, 1985 (about three months before the first trial) the Commonwealth's Attorney was well aware that Evans-Smith contended that someone else has committed the murder. The

Commonwealth was well aware that the area in which the murder occurred was rural, and, accordingly, it was not an area where one would expect a great amount of vehicular or pedestrian traffic. Hence, any information of an unrecognized or suspicious vehicle or person in the area at a time not too remote from the offense would be exculpatory. Judge Penn recognized this and so ruled when he ordered the "Gefaell Statement" of an event occurring two weeks prior to the murder be produced to the defense.

This Court feels that the evidence of Spalding's statements to Merchant are clearly exculpatory given all the circumstances of this case. Therefore, any argument that the defense did not ask specifically for notes of Merchant's "road check" is of no consequence.

Any argument that the reports are not exculpatory because Spalding said she saw the unknown person on Thursday or Friday before the Monday morning murder and not that morning is not accepted by this Court. A perpetrator could have been observing the farm and its occupants in preparation of committing an offense such as a burglary. He could have been prevented from committing an offense the day he was seen by Spalding only to return Monday morning to commit the murder.

Both the Commonwealth and the defense knew that the evidence against the Petitioner was entirely circumstantial. In such a case the existence of evidence that tends in any way to show that the defendant is not guilty is exculpatory. Evidence that an

unknown male was present near the farm even three or four days before the murder must be deemed exculpatory.

The examination of Merchant's notes by the Questioned Document Branch of the United States Secret Service (Respondent's Exhibit 5) found "no indication to suggest the questioned entry (notes of the telephone conversation with Spalding on April 16, 1985) was falsely dated." As an agent of the Commonwealth, Merchant had written notes of exculpatory information on April 16, 1985. The Commonwealth was certainly aware of the "road check" of Merchant because five witnesses (James Anderberg, Ralph Clark, Mark Simms, Bill Packard and Bart Johnston) testified for the Commonwealth as to the absence of suspicious vehicles Route 725. All five

of these witnesses were stopped by Merchant during the "road check" on April 16, 1985. The Court is aware of this from having examined in camera copies of Merchant's notes tendered to the Court by Mr. McLees at the hearing herein on September 23, 1992. These copies were sealed by the order entered herein on September 23, 1992. The Court sees no need in light of the evidence presented on January 12, 1993 for these copies to remain sealed; and, accordingly, orders them to be unsealed and filed herein.

Merchant is an experienced investigator. At the time of this investigation he had been with the Loudoun County Sheriff's Department since February 1984 having retired after twenty years service with the Fairfax County Police Department. A police officer

with that much experience in criminal investigations should reasonably be expected to have a basic knowledge of the principles of Brady and exculpatory evidence. It goes without saying that, of course, the Commonwealth's Attorney was aware of Brady and its requirements. No explanation was offered as to why Spalding's statements as reported to Merchant one day after the murder were not produced to defense counsel other than the argument, which this Court rejects for reasons set forth above, that the statements are not exculpatory.

This Court cannot turn its back without comment on the response of Merchant when the petition herein was filed and it came to light that Evans-Smith had learned of Spalding's statements. Despite the fact that

Merchant made notes on April 16, 1985 of both the road stop and the telephone conversation (the notes being no more than five pages apart in a relatively small notebook), in his affidavit dated June 1, 1992, Merchant states that he had "no notes or memoranda" of the telephone conversation. Spalding's affidavit filed with the petition says she talked on the phone with Merchant "a day or two" after she was stopped by Merchant. Merchant acknowledges in his affidavit of June 1, 1992 that he read Spalding's affidavit. The notes of the telephone conversation come right after the notes of the last stop on April 16, 1985. Also, in his affidavit Merchant states that his notes from the road check were given to defense counsel before trial pursuant to a discovery order of this Court. There was

absolutely no evidence presented that the notes were given to defense counsel or why Merchant would have made such a statement under oath.

In his second affidavit dated September 21, 1992, and filed with the Answer to the Amended Petition, Merchant states that after reviewing his notebook he found the notes about the telephone conversation. No questions were ever asked of Merchant at the hearing as to why he did not discover the notes of the telephone conversation (located directly after the road check notes) until after making the first affidavit. Merchant stated he made notes in his notebook chronologically. He did not state he made notes in any other place. If he knew Spalding contended she talked to him a day or two after the stop, it seems to

this Court that Merchant would have known exactly where to look without any difficulty for any notes of the telephone conversation. The notes are exactly where one would expect them to be considering when Spalding said in her affidavit that she called Merchant and the method he used to take his investigative notes.

Although it is not relevant or material to this proceeding why the statements were not produced, this Court cannot just merely look away from the circumstances of the nondisclosure when it considers the importance of the Evans-Smith prosecution, the severity of the offense, the defense's theory at trial, the continuing protestation of innocence by Evans-Smith, the rulings of Judge Penn before the first trial as to other

information he deemed exculpatory and the involvement of an experienced prosecutor and investigator. In its first written discovery response the Commonwealth even stated that it would present all witness statements to the Court for in camera inspection, but obviously it did not do so. Considering the pre-trial circumstances of this case, it is very difficult to understand the failure to produce Spalding's statements to the defense.

Spalding's statements in light of all the circumstances of this case are exculpatory.

(2) Materiality of the Spalding Reports

The materiality issue must be addressed from two aspects. First, this Court must consider what defense counsel could have done or would have done differently if

the Spalding statements had been revealed to them. Second, this Court has to consider what the effect would have been on the result of the trial if Spalding's evidence had been presented to the jury.

Mr. Moyes testified at the hearing that if defense counsel had known of Spalding's statements to Merchant, then they would have investigated everyone in the neighborhood and looked for a match to the unknown hairs found at the crime scene. The defense would have conducted further investigation of people near the murder scene and would have pursued further forensic tests. However, the Petitioner gave no specifics of exactly what additional investigation of the neighborhood his private investigators would have pursued. Mr. Moyes testified that Evans-Smith spent close to

$100,000.00 on private investigators, but there was no evidence of exactly what they did in their investigation of people in the neighborhood. There was no evidence of what the investigators did not pursue but would have pursued if they had been aware of Spalding's statements to Merchant.

Spalding lived close to the Evans-Smith farm at the time of the murder yet there was no evidence that the defense had interviewed her or any member of her family before trial. If the defense's theory was someone else perpetrated the crime, then it seems logical to at least ask the occupants of all the nearby homes if they had seen or heard anything. Also, the defense's investigators could have conducted a "road check" similar to the one that Merchant performed.

The defense was well aware (from Evans-Smith's own observations) of suspicious activity on Route 725 at or about the time of the murder. This should have been enough to cause the defense to investigate the presence of suspicious vehicles or persons at that time. The Petitioner has not particularized anything unusual or peculiar to Spalding's statements that would have caused the defense to investigate in a different manner.

Granted that if the defense had known of Spalding's statements, then she could have been interviewed close in time to her observations which would likely result in a clearer recollection and the development of more details. To say that she might have then provided information that could have led to the identity of

the person that she saw is sheer speculation. It is common sense that the observations that would have led to a specific identification of the person are the observations that she would most likely continue to recall to this day. Her recollections as presented at the hearing do not provide anything that would tend to identify the person she saw that morning.

The petitioner argues that if he had been aware that Spalding had seen a person as she said, then his defense could have been pursued additional forensic testing. He did not particularize or specify what testing. Perhaps tests could be done to the hairs found at the scene if the person Spalding saw was found. But it is sheer speculation that the person could have

been found. All forensic tests were available to the defense as to any item found at the crime scene. The Petitioner has failed to show what would have been done differently as to forensic testing if the defense had been aware of Spalding's statements.

This Court would have to speculate as to what other things the defense could have done and what the results would have been if the defense had been advised before trial of Spalding's report. The Petitioner has presented nothing to show that it would have been even probable that having knowledge of Spalding's statements the person could have been located by the defense. Even if the person were located, one would have to again speculate that the person would have provided exculpatory evidence. The

presence of the person on a public road where he had a right to be does not automatically in and of itself implicate him in a nearby murder.

It is certainly reasonable to assume that if the defense had known of Spalding and her report to Merchant, then the defense would have called her as a witness. If she had testified to seeing a person on Route 725, even if on the morning of the Thursday or Friday before the Monday murder, then it would have been admissible at trial. However, this Court cannot find exactly what her testimony would have been or what it would be if she had testified at a prior trial or would testify at another trial if held. For example, she told Merchant in the telephone conversation of April 16, 1985, that the person had a reddish-

brown beard and she stated in her affidavit filed with the petition that the person had blond hair but no beard, but at the hearing she testified that the person had blondish-brown hair and did not mention a beard. Also, in her affidavit she stated that she called Merchant within a day or two of the stop, but at the hearing she testified definitely that she called Merchant the day of the stop. Further, at the hearing she testified to other information about the person which she did not relate to Merchant on April 16, 1985, e.g., the person had his head down and a baseball cap pulled down over his eyes. On September 17, 1992 Spalding gave a statement to the State Police that she had seen the person the "day before, two days before" she was stopped and the

person had blond hair. The Court cannot overlook that Spalding was working for the law firm of one of Evans-Smith's trial attorneys at the time her statements came to light in May 1992.

Even if Spalding testified at trial that the man she saw had blond hair or brownish-blond hair, the Commonwealth could have impeached her by Merchant's testimony of her prior inconsistent statements to him that the man had a reddish-brown beard.

Even though the case against Evans-Smith was entirely circumstantial, there was sufficient circumstantial evidence presented at trial to convict him. There is no need to review that evidence here as this Court reviewed it in detail in its opinion letter of July 21, 1989 when the motion to set aside the verdict for

insufficient evidence was denied. This ruling has been reviewed by the Court of Appeals and the Supreme Court of Virginia, and neither court reversed that decision.

The jury heard evidence of at least two other suspicious incidents and/or persons near in place and time to the murder but found the Petitioner guilty. This Court is of the opinion that even if the jury had received evidence of a suspicious unknown person with blond hair on Route 725 near the Evans-Smith farm on the morning of the murder, the result would have been the same despite the evidence of one blond hair of unknown origin (not forcibly removed, but fallen out) found on the stairway leading to the bedroom where Barbara was found and one hair of unknown origin found near her

hand. There was no evidence of a forced entry. There was no evidence of any outside dirt, mud or moisture being tracked inside the house. The Commonwealth's forensic scientist, Deanna Dabbs, testified at length at the trial about how unknown miscellaneous hairs can be present at a crime scene. This Court is of the opinion that even if the jury had heard Spalding's testimony, there is no reasonable probability that the outcome would have been different.

For the foregoing reasons, this Court finds that even though Spalding's statements to Merchant are exculpatory, the statements are not material because there is no reasonable probability that, had the evidence been disclosed to the defense, the result would have been different. Accordingly, the Petitioner

is denied any habeas relief on the ground of the failure to disclose exculpatory evidence.

C. Claim of Loss of Potentially Useful Evidence Because of Bad Faith of the Police

The Petitioner asserts in his Amended Petition that the statements of Spalding to Merchant should be considered as evidence potentially useful to the defense which was lost due to the bad faith of the police in violation of his due process rights citing Arizona vs. Youngblood, 109 S.Ct. 333 (1988). The Petitioner sets forth in fifteen paragraphs over two and one-half pages allegations of various actions by the Sheriff of Loudoun County and two Sheriff's Department investigators, Merchant and Jeff Brown, Which "reveal a

pattern of bad faith" on the part of the police.

This Court is of the opinion that Youngblood only applies to evidentiary material in the hands of the prosecution that becomes lost or destroyed before the defense could test it, and the test results might have exonerated the accused. Youngblood does not apply to statements or observations of witnesses of which the prosecution may have knowledge because such statements or observations come under the Brady doctrine. Youngblood deals with evidence that never became available to help the defense. Such is not the case here because the Petitioner eventually became aware of the Spalding statements. Brady concerns exculpatory evidence known to the prosecution whereas Youngblood

concerns evidence that if preserved would have been potentially useful to the accused. Youngblood deals with items such as blood samples, clothing or other items of physical evidence which are no longer available for the defense's experts to analyze and test for the defendant's benefit. Even if Merchant's notes are considered evidentiary material under Youngblood, the notes have not been lost or destroyed, and the Petitioner has not articulated how he was prejudiced by not having Merchant's actual notes as opposed to merely not having the information related to Merchant by Spalding.

Youngblood is not applicable to the facts as alleged by the Petitioner or as presented at the hearing. The allegations of bad faith, therefore,

even if true, are immaterial and not relevant to this proceeding. Any relief on the basis of an alleged Youngblood violation is denied to the Petitioner.

Evans-Smith may not have liked how he was treated by the police officers, but nothing has been alleged to show that his rights were violated. He is entitled to a fair trial, not a perfect trial. This Court is of the opinion that he received a fair trial in April 1989. Insensitivity, discourtesy and overzealousness of police officers may be distasteful to Evans-Smith (and they are to this Court, but surely to a lesser extent), but the incidents alleged do not arise to a constitutional deprivation.

Conclusion

For the reasons stated herein, the Amended Petition for Writ of Habeas

Corpus is denied, and it is dismissed. Let Mr. McLees, Assistant Attorney General, prepare an order consistent with these Findings of Fact and Conclusions of Law. Copies hereof have been mailed this day to counsel of record. Petitioner is advised of his right to appeal this decision.

1 February 1993 /s/ James H. Chamblin
Date James H. Chamblin,
Judge

EVANS-SMITH, WILLIAM, PETITIONER
vs.
TAYLOR, JOHN B., WARDEN

93-1195

SUPREME COURT OF THE UNITED STATES

127 L. Ed. 2d 567

March 7, 1994

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF VIRGINIA, LOUDOUN COUNTY.

JUDGES

Rehnquist, Blackmun, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg.

OPINION

The petition for writ of certiorari is denied.

Select testimony from R. 718 and R. 1176 (Dr. Byer's testimony concerning the panties found in the victim's mouth).

R. 718:

A. ...there was a pair of white underpants that had been stuffed in the mouth....

Q. (Prosecution) Let me ask you for a second about the pants which you indicate were in the mouth. What did you notice about the manner in which those were in the decedent's mouth?

A. They were in the mouth or the oral cavity, but they could be removed rather easily. in other words, they weren't, what I would characterize as being tightly stuffed into the mouth.

....

Q. When one dies in that manner, can you state whether or not that is likely to produce any blood on something which would be in the mouth such as these panties?

A. With death ensuing in this manner, one would get what we term pulmonary edema or fluid in the lungs. This then could come up the airway and could contaminate anything that's in the oral cavity or the mouth.

Q. All right, would that show up as blood, then?

A. Yes.

Q. When would that happen relevant to death?

A. It would happen during the placement of the ligature or it could happen in the postmortem state, particularly with movement of the body if it's moved from a position where it's on its back to one where it's on its front.

R. 1776:
(Stipulation read by the Court)

"I have reviewed the photographs of Barbara Evans-Smith. The material which looks like blood in the ear I think came from her mouth. I can say that to a reasonable medical certainty.

I suspect it is the same material that discolored the underpants which were sent to the lab. That fluid came from the lungs. The fluid had the gross appearance of blood stained or blood tinged fluid. It would not have been straight blood. The material did not come from any open wound in, or near the ear.

The material could have flowed into the ear during the time the ligature was put on or at a substantially later time. I have no opinion as to when it actually happened.

If the material in the ear came from the mouth, the gag was placed in the

mouth after the initial discharge from the mouth because if the gag was there first, it would have undoubtedly absorbed the material.

The autopsy made no findings concerning this and, hence, it was not included in the autopsy report.

I would believe that the body was laying on the floor at the time this happened with the head turned to the left when the fluid ran into the ear.

It is my opinion to a reasonable medical certainty that this is what happened in view of the fact that there were no open wounds to account for the material in the ear. The fluid was not submitted for analysis."

MOTION FILED
AUG 16 1994

(3)

No. 94-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN B. TAYLOR, Warden,
Staunton Correctional Center,

Petitioner,

vs.

WILLIAM EVANS-SMITH,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

21 pp

QUESTIONS PRESENTED

1. Are more specific guidelines for the application of *Jackson* v. *Virginia* needed to prevent idiosyncratic application of that rule on federal habeas corpus?

2. Does a federal court improperly create a "new rule" on federal habeas corpus when it grants habeas relief on the ground that subsidiary inferences have not *individually* been proven beyond a reasonable doubt?

3. Should federal district courts be given back the discretion, which they had under *Salinger* v. *Loisel* and *Ex parte Hawk* before 1953, to deny a habeas petition on the ground that the issues had already been fully litigated in state court?

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN B. TAYLOR, Warden,
Staunton Correctional Center,

Petitioner,

vs.

WILLIAM EVANS-SMITH,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 37.2, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of the petition in the above captioned case. Counsel for petitioner has consented, but counsel for respondent has refused consent.

In the accompanying brief, *amicus* argues that (1) the federal courts need more specific guidance in applying *Jackson* v. *Virginia*; (2) the prosecution may meet its burden of proof by building up subsidiary inferences, no one of which by itself constitutes proof beyond a reasonable doubt; (3) the Court of Appeals' decision to the contrary is an impermissible "new rule"; and (4) district courts ought to be given back their pre-1953 discretion to deny relitigation of fully litigated issues.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation

relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and reliable determination of guilt and swift execution of punishment.

The Court of Appeals' misapplication of *Jackson* v. *Virginia* is contrary to the interests CJLF was formed to advance. Error in applying this rule is even worse than error in granting a new trial, since a wrong *Jackson* ruling frees the criminal forever. CJLF therefore has an interest in the case.

For the foregoing reasons, *amicus* requests leave to file its brief.

August, 1994

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

TABLE OF CONTENTS

Questions presented i

Motion for leave to file iii

Table of authorities vi

Brief *amicus curiae* 1

Summary of facts and case 1

Summary of argument 2

Argument 3

I

The federal courts need further guidance in applying *Jackson* v. *Virginia* 3

II

"A brick is not a wall"; the assertion it must be is a new rule, and a wrong rule 7

III

This Court should consider restoring *Salinger/Hawk* discretion to the federal district courts 9

Conclusion 15

TABLE OF AUTHORITIES

Cases

Adamson v. Ricketts, 865 F. 2d 1011 (CA9 1988) 14

Alabama v. Smith, 490 U. S. 794, 104 L. Ed. 2d 865, 109 S. Ct. 2201 (1989) 14

Beam v. Paskett, 3 F. 3d 1301 (CA9 1993) 14

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 13

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) 9

California v. Ramos, 463 U. S. 992, 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983) 15

Darr v. Burford, 339 U. S. 200, 94 L. Ed. 761, 70 S. Ct. 587 (1950) 12, 13

Dawson v. Delaware, 117 L. Ed. 2d 309, 112 S. Ct. 1093 (1992) 4

Denton v. Hernandez, 118 L. Ed. 2d 340, 112 S. Ct. 1728 (1992) 10

Estelle v. McGuire, 116 L. Ed. 2d 385, 112 S. Ct. 475 (1991) 5, 6

Evans-Smith v. Commonwealth, 361 S. E. 2d 436 (Va. App. 1987) 1

Ex parte Cuddy, 40 F. 62 (C. C. S. D. Cal. 1889) 11

Ex parte Hawk, 321 U. S. 114, 88 L. Ed. 572, 64 S. Ct. 448 (1944) 12

Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868, 6 S. Ct. 734 (1886) 13

Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963) 12

Gilmore v. Taylor, 124 L. Ed. 2d 306,
113 S. Ct. 2112 (1993) 8

Hamilton v. Vasquez, 17 F. 3d 1149 (CA9 1994) 15

Jackson v. Virginia, 443 U. S. 307 , 61 L. Ed. 2d 560,
99 S. Ct. 2781 (1979) 3, 7

Lewis v. Adamson, 497 U. S. 1031, 111 L. Ed. 2d 795,
110 S. Ct. 3287 (1990) 14

Lewis v. Jeffers, 497 U. S. 764, 111 L. Ed. 2d 606,
110 S. Ct. 3092 (1990) 14

Lockhart v. Fretwell, 122 L. Ed. 2d 180,
113 S. Ct. 838 (1993) 8

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961) 9

McGuire v. Estelle, 902 F. 2d 749 (CA9 1990) 5

Moore v. Dempsey, 261 U. S. 86, 67 L. Ed. 543,
43 S. Ct. 265 (1923) 10, 12

People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) . . . 4

Pierce v. Underwood, 487 U. S. 552, 101 L. Ed. 2d 490,
108 S. Ct. 2541 (1988) 10

Riggins v. Nevada, 118 L. Ed. 2d 479,
112 S. Ct. 1810 (1992) 10

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 14

Salinger v. Loisel, 265 U. S. 224, 68 L. Ed. 989,
44 S. Ct. 519 (1924) 11, 12, 13

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 7

Victor v. Nebraska, 127 L. Ed. 2d 583,
114 S. Ct. 1239 (1994) 4

Wade v. Mayo, 334 U. S. 672, 92 L. Ed. 1647,
68 S. Ct. 1270 (1948) 12

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511,
110 S. Ct. 3047 (1990) 14

West v. Wright, 931 F. 2d 262 (CA4 1991) 4

Withrow v. Williams, 123 L. Ed. 2d 407,
113 S. Ct. 1745 (1993) 14

Wright v. West, 120 L. Ed. 2d 225,
112 S. Ct. 2482 (1992) 3, 4, 7, 9, 10

Treatise

C. McCormick, Evidence (1st ed. 1954) 7

Miscellaneous

139 Cong. Rec. S15818 (1993) 14

140 Cong. Rec. H2272 (1994) 14

140 Cong. Rec. H2420-2421 (1994) 14

J. Barlett, Familiar Quotations (15th ed. 1980) 8

U. S. Dept. of Justice, Bureau of Justice Statistics,
Sourcebook of Criminal Justice Statistics 1992 (1993) . . . 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JOHN B. TAYLOR, Warden,
Staunton Correctional Center,

Petitioner,

vs.

WILLIAM EVANS-SMITH,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

SUMMARY OF FACTS AND CASE

The facts are set forth in detail in four opinions in the Appendix to the Petition for Writ of Certiorari 3A-17A, A32-A43, A71, A79-A80. Briefly, Barbara Evans-Smith was murdered in the early morning of April 15, 1985. App. to Pet. for Cert. 4A. At respondent's first trial for the murder, the trial court admitted evidence of Mrs. Evans-Smith's statements to several people regarding the deterioration of her marriage and that her husband, respondent William Evans-Smith, was hostile and had previously tried to kill her. His conviction was reversed on appeal on the ground, among others, that this was inadmissible hearsay. *Evans-Smith* v. *Commonwealth*, 361 S. E. 2d 436, 439-445, 449 (Va. App. 1987).

Retrial therefore proceeded without evidence of motive. The prosecution's case consisted of a crime scene that was poorly staged to look like a robbery and rape, the lack of any sign of forced entry, the time of death and defendant's schedule,

defendant's demeanor and unusual questions when informed of the death by investigators, defendant's inconsistent statements, his attempt to get a co-worker to change his story about defendant's arrival time at work, a neighbor's discovery in a field two weeks later of a jewelry box reported stolen by defendant but not looking like it had been in a field for two weeks, and other evidence. App. to Pet. for Cert. A35-A43.

The trial court judge denied a motion to set aside the verdict. He reviewed the evidence under the state standard that a circumstantial case "must exclude every reasonable theory of innocence." *Id.*, at A32. "*Having heard and seen all the evidence*, I am of the opinion that there was sufficient evidence presented for the jury to find under the instructions given that the defendant did murder Barbara Evans-Smith." *Id.*, at A43 (emphasis added).

The Virginia Court of Appeals reviewed the evidence under the same standard and agreed. *Id.*, at A71. The Virginia Supreme Court also agreed and denied relief. *Id.*, at A76.

On federal habeas corpus, the District Court reviewed the sufficiency of the evidence *de novo* under the more generous (to the prosecution) constitutional standard and found it sufficient. *Id.*, at A79-A80. The District Court also denied a certificate of probable cause. Pet. for Cert. 11.

The Court of Appeals for the Fourth Circuit, disagreeing with the unanimous view of all the prior courts, granted habeas corpus relief. App. to Pet. for Cert. 29A.

SUMMARY OF ARGUMENT

This case presents issues which go far beyond the facts of the individual case. It involves a repeated failure of the courts of appeals to observe proper limits on habeas jurisdiction. First, the repeated misuse of *Jackson* v. *Virginia* indicates a need for this Court to lay down some more specific guidelines on how to apply the general rule of that case to commonly occurring factual situations. Without such guidance, federal courts are simply second-guessing the jury, as was done in this case.

Second, the approach to evidence taken by the Court of Appeals in this case was a radical departure from established principles of the law of evidence. The new, dangerous, and wrong rule thus created is contrary to the rule of *Teague* v. *Lane* and threatens much mischief.

Finally, the district judge's denial of a certificate of probable cause strongly implies that he did not believe this was the kind of case where *de novo* review is needed. To limit the misuse of the Great Writ as an instrument of injustice, rather than justice, this Court should consider restoring to the district courts their discretion to decline to reopen fully litigated questions, a discretion they clearly had prior to 1953.

ARGUMENT

I. The federal courts need further guidance in applying *Jackson* v. *Virginia*.

In *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992), this Court unanimously reversed a decision of a Fourth Circuit panel, including two of the three judges in the present case, for misapplication of *Jackson* v. *Virginia*, 443 U. S. 307 (1979). Though the *West* Court agreed on little else, the stunning wrongness of the lower court's *Jackson* analysis was evident to all. See *West*, 120 L. Ed. 2d, at 241 (opinion of Thomas, J.) ("clear"); *id.*, at 242 (opinion of White, J.) ("amply demonstrates"); *ibid.* (opinion of O'Connor, J.); *id.*, at 250 (opinion of Kennedy, J.); *ibid.* (opinion of Souter, J.) ("could not disagree").[1]

Oblivious to the rebuke, the Court of Appeals in the present case winds up its *Jackson* analysis with this jaw-dropping statement: "As in *West*, the instant case requires not only the reversal of a federal district court, but also of the state trial and appellate courts." App. to Pet. for Cert. 28A. In other words, the court below relied on its own reversed *West* opinion *for the very point on which it was reversed*. The *West* case did *not* require reversal of the state courts and the federal district court.

---

1. The corresponding pages of 112 S. Ct. are 2493 and 2500.

The Court of Appeals was wrong in holding that it did, and it was reversed by this Court on that point.

Something is gravely wrong here. The wording of the *Jackson* opinion has proved insufficient to prevent idiosyncratic application. In *West*, Virginia and *amicus* asked this Court to create a standard of deference to reasonable state court resolution of mixed questions of law and fact. See *West*, *supra*, 120 L. Ed. 2d, at 233, 112 S. Ct., at 2486. The result was a badly splintered opinion. Absent a deferential standard, there is a crying need to put some meat on *Jackson*'s bones.

It is bad enough when the murderer goes free because the constable blunders. See *People* v. *Defore*, 242 N. Y. 13, 21, 150 N. E. 585, 587 (1926) (Cardozo, J.). It is far worse for a murderer to go free when the state is right, but the federal Court of Appeals blunders.

Two errors are apparent in both the present and the earlier *West* opinion. Both involve commonly occurring evidentiary situations, and clear guideposts would establish greater uniformity and fairness in the application of *Jackson*.

First, the Court of Appeals has once again failed to acknowledge the powerful implications of a defendant's duplicity. In *West* v. *Wright*, 931 F. 2d 262, 269-270 (1991), the Fourth Circuit held that a false explanation of possession of stolen goods, if not "inherently implausible," could not "fairly be treated as positive evidence of guilt" of theft. This was error. "[I]f the jury did disbelieve West, it was further entitled to consider whatever it concluded to be perjured testimony as affirmative evidence of guilt." *Wright* v. *West*, *supra*, 120 L. Ed. 2d, at 241, 112 S. Ct., at 2492.

The jury's job is to draw inferences of probability, see *Victor* v. *Nebraska*, 127 L. Ed. 2d 583, 600, 114 S. Ct. 1239, 1251 (1994), and "[j]urors do not leave their knowledge of the world behind when they enter a courtroom." *Dawson* v. *Delaware*, 117 L. Ed. 2d 309, 321, 112 S. Ct. 1093, 1101 (1992) (Thomas, J., dissenting). We all know that people who lie are generally trying to cover something up. Where a misdeed has been committed and no other motive for lying is discernable, experience tells us that people who lie are usually trying to hide their own complicity in the misdeed. Whether the misdeed be a

broken vase, the burglary of a political opponent's office, or a murder, covering up is a powerful indicator of guilt. The trial judge understood this. App. to Pet. for Cert. A37.

Footnote 24 of the Court of Appeals' opinion repeats the glaring logical error in *West*. The court brushes off defendant's contradictory statements as "inconsequential" based only on the probative value of the content of the statements. *Id.*, at 24A. But some of these statements must certainly be false, and the jury may justifiably infer that they were deliberate lies. Duplicity itself can have the weight of an anvil, even if the substance of the lie is only a feather.

The Court of Appeals' second error is a failure to heed *Jackson*'s mandate to presume that all arguable inferences are resolved in favor of the prosecution, see 443 U. S., at 326, even while paying lip-service to that requirement. In footnote 25, the court says this about defendant's attempt to get a colleague to change his story:

> "Once again, what is required here, in order to find for the Commonwealth, is a kind of double inference. We must infer that the content of Evans-Smith's phone conversation with someone in New Mexico was meant to make his colleague's story consistent with his own, and then we must infer that the reason he desired consistency was to create an alibi since he had committed the murder. However, the first inference might lead only to the conclusion that *whether or not* he had committed the murder, it would be in Evans-Smith's interest to present a consistent story to the police. After all, the recipient of the phone call testified that Evans-Smith simply said that it would be 'nice' if the two of them had the same story. He did not appear angry, merely upset." App. to Pet. for Cert. 25A (emphasis in original).

Nothing in *Jackson* exempts double inferences from its mandatory presumption. So long as both inferences are plausible, as they are in this case, *Jackson* requires them to be resolved in favor of the prosecution. The fact that an inference *might* lead to a contrary conclusion is simply irrelevant.

A third error in the present opinion echoes the misconception of evidence in *McGuire* v. *Estelle*, 902 F. 2d 749, 753 (CA9 1990), rev'd *sub nom. Estelle* v. *McGuire*, 116 L. Ed. 2d 385,

112 S. Ct. 475 (1991). In that case, the Ninth Circuit had held irrelevant, and hence inadmissible, evidence which served to narrow the class of suspects, although not limited to the defendant. That determination was wrong in *McGuire*, and the Fourth Circuit's dismissal of similarly probative evidence is equally wrong here.

In *McGuire*, the prosecution introduced evidence of "battered child syndrome," which indicates that the child died as the result of a pattern of abuse. See *id.*, 116 L. Ed. 2d, at 395, 112 S. Ct., at 479. Among other objections, McGuire complained that there was no evidence directly linking him to the prior injuries. *Id.*, 116 L. Ed. 2d, at 399, 112 S. Ct., at 483. Nonetheless, the evidence was not only admissible, but powerfully probative. "The proof of battered child syndrome itself narrowed the group of possible perpetrators to McGuire and his wife . . . ." *Id.*, 116 L. Ed. 2d, at 400, 112 S. Ct., at 483. The Court was unanimous on this point. See *id.*, 116 L. Ed. 2d, at 403, 112 S. Ct., at 486 (O'Connor, J., concurring in part and dissenting in part) (agreeing that a properly instructed jury could consider the evidence for this purpose, and that the evidence was sufficient).

The present case involves a different question of law, but the logical error is similar. The Court of Appeals fails to appreciate the importance of evidence which narrows the suspect class. The inference that the crime was not a felony murder (*i.e.*, murder in the course of a rape, robbery, and burglary), but had been staged to look like one, narrows the suspect class to persons who had some *other* motive. Among homicides for which the circumstances are known, arguments and felony murder are far and away the most common circumstances. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1992, p. 386 (1993). If felony murder is eliminated, the probability that the murder arose from an argument is greatly enhanced. With whom is a married woman, with no children at home, likely to argue at six in the morning?

Yet the Court of Appeals brushes off this important evidence. "The prosecution urges us to believe that the crime scene was staged," the court says. App. to Pet. for Cert. 22A, n. 20. No, the *habeas court* need not believe this inference; *Jackson* requires that this eminently arguable inference be presumed to

have been resolved by the *jury* in the prosecution's favor. What the judges of the Court of Appeals believe or do not believe is irrelevant. They are not on the jury. The staging evidence has powerful probative value, far more than the Court of Appeals ascribed to it.

Even worse, though, the Court of Appeals goes on to hold this one piece of evidence to a far higher standard than it is required to bear. There lies the most serious error of all.

II. "A brick is not a wall"; the assertion it must be is a new rule, and a wrong rule.

After discounting the evidence that the crime scene was staged to look like a felony murder, the Court of Appeals went on to say this:

> "Even if a rational fact-finder would accept this theory, the Commonwealth's bald assertion that no one but Evans-Smith would have staged the crime scene simply is insufficient ground for us to conclude that a rational fact-finder could connect Evans-Smith beyond a reasonable doubt to the killing." App. to Pet. for Cert. 22A, n. 20.

This statement reveals a grave misconception of the nature of evidence. A single piece of evidence, or a single inference from several pieces of evidence, is not required to bear *by itself* the heavy burden of proof beyond a reasonable doubt. "A brick is not a wall." C. McCormick, Evidence § 152, p. 317 (1st ed. 1954). This is an old rule.

The Court of Appeals approaches the prosecution's case, chisels off one brick, declares it is not a wall, and throws it away. After repeating this exercise several times, see, *e.g.*, App. to Pet. for Cert. 20A, n. 16; *id.*, at 21A, n. 18; *id.*, at 25A, n. 25, the court finds there is no wall and renders judgment for the habeas petitioner. *Id.*, at 29A. *Jackson* v. *Virginia*, 443 U. S. 307 (1979) does not dictate this mode of proceeding, and hence the court has created a new rule. See *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (plurality); see also *Wright* v. *West*, 120 L. Ed. 2d 225, 254, 112 S. Ct. 2482, 2503 (1992) (opinion of Souter, J.)

As the Commonwealth's petition correctly notes, this Court's cases after finality of the present judgment further reinforce their position. Pet. for Cert. 21, n. 7. *Amicus* will not add to this argument, as no addition is needed, but will only point out why subsequent authority is appropriate in a *Teague* argument.

Most judgments are final when they are final. Cf. Y. Berra, quoted in J. Bartlett, Familiar Quotations 903 (15th ed. 1980). Habeas corpus is an extraordinary exception to this rule, permitting relitigation of issues already resolved by a final judgment of a court of competent jurisdiction. Defendants who prevail in state court are fully protected by the Double Jeopardy Clause; the state can never collaterally attack adverse final judgments. Only the state needs to defend against collateral attacks, and only the state needs limitations on collateral attack. Thus, permitting the state to invoke post-finality authority, while the defendant cannot, is not an asymmetry favoring the state; it is merely a modest limitation on an asymmetry which heavily favors the defendant.

The *Teague* nonretroactivity rule is a partial protection for final judgments. The limitation therefore only applies to subsequent authority used to attack the judgment, and not to subsequent authority used to support the judgment. Where the reason for the rule ends, the rule ends. *Lockhart* v. *Fretwell*, 122 L. Ed. 2d 180, 191, 113 S. Ct. 838, 844 (1993). "Although [the subsequent cases were] decided after respondent's conviction and sentence became final, [they do] not work a change in the law favoring criminal defendants, and therefore may be considered in our *Teague* analysis." *Gilmore* v. *Taylor*, 124 L. Ed. 2d 306, 318, 113 S. Ct. 2112, 2117 (1993); *id.*, 124 L. Ed. 2d, at 322, 113 S. Ct., at 2121 (O'Connor, J., concurring in the judgment).

Not only was the Court of Appeals' examine-and-discard approach not dictated by precedent existing in 1990, it is not dictated by precedent existing at the present time. This approach is a new rule, and it threatens to tear down circumstantial evidence cases throughout the circuit, if not throughout the nation. Such a rule would reward the worst of murderers: those cool and clever enough to avoid or destroy any direct evidence of their guilt. The issue is broad enough and important enough to warrant this Court's attention.

III. This Court should consider restoring *Salinger/Hawk* discretion to the federal district courts.

Although not raised by the Commonwealth, there is another, deeply disturbing aspect to this case which the Court may wish to consider.[2] Of the many jurists to review the sufficiency of the evidence in this case, there is one who, beyond question, has the best vantage point: the trial judge. His careful, detailed analysis of the evidence is appended to the Petition at pages A32-A43. All that has followed has been Monday morning quarterbacking.

Under similar circumstances, a proposal that the federal courts *must* defer to the state courts badly divided this Court in *Wright* v. *West*, 120 L. Ed. 2d 225, 112 S. Ct. 2482 (1992). The district judge in the present case felt the opposite injunction. "The burden is on the Federal Court in this situation to review the matter de novo . . . ." App. to Pet. for Cert. A79. Between these two opposing "musts" lies the discretionary "may." Discretion on this point was once the law of the land, and *amicus* respectfully suggests that this Court consider whether it should be again.

Federal habeas review is an undoubtedly important safeguard when the state processes break down, see, *e.g.*, *Moore* v. *Dempsey*, 261 U. S. 86, 91 (1923), but there was no breakdown here. Instead, the trial judge reviewed the evidence under a standard more favorable to the defendant than federal law requires. Compare App. to Pet. for Cert. A32 (state standard) with *id.*, at A79 (federal standard). *De novo* review on habeas corpus is sometimes justified on the notion that state courts are institutionally hostile to federal rights. See, *e.g.*, *Butler* v. *McKellar*, 494 U. S. 407, 427, n. 8 (1990) (Brennan, J., dissenting). Even suspending our disbelief in the premise, it is difficult to see how this justification applies to courts which have voluntarily created a *higher* state standard than federal law requires. If the Virginia courts were hostile to their own standard, they could simply overrule it.

---

2. The Court has the discretion to consider issues raised by *amici*. See, *e.g.*, *Mapp* v. *Ohio*, 367 U. S. 643, 646, n. 3 (1961) (overruling *Wolf* v. *Colorado* raised only by *amicus*).

In this case, then, the federal Court of Appeals has no higher claim to fidelity to the controlling standard than the four courts that previously considered and rejected Evans-Smith's claim. The Court of Appeals' perspective on the facts is no better than three of those courts' perspectives, and it is decidedly inferior to the trial court's view.[3] Why, then, should its contrary conclusion prevail?

The Court of Appeals' *de novo* application of *Jackson* is premised on the District Court's *de novo* application of the same rule. This Court succinctly stated the standards of review in *Pierce* v. *Underwood*, 487 U. S. 552, 558 (1988):

> "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')."

Thus, a denial of habeas corpus because the district judge has reconsidered the underlying legal question, and agrees with the state courts, is reviewed *de novo*. On the other hand, if the district judge had the discretion to review the state court proceedings, to decide that they have provided a fair hearing and reached a satisfactory result, and to deny relitigation on that basis, this decision would be reviewable only for an abuse of discretion. Cf. *Denton* v. *Hernandez*, 118 L. Ed. 2d 340, 350, 112 S. Ct. 1728, 1734 (1992) (dismissal of frivolous claim discretionary, reviewed only for abuse).

In *West*, Justice O'Connor relied on a series of pre-1953 cases. 120 L. Ed. 2d, at 243, 112 S. Ct., at 2494. These cases do indeed stand for the proposition for which Justice O'Connor cites them, that a prior denial of relief does not stand as a strict *res judicata* bar to habeas relief. However, when the question

---

3. For example, a significant piece of evidence was defendant's lack of tears, raising an inference that his grief was feigned. See Pet. for Cert. 8-9. In this context, the factfinder may legitimately consider his demeanor at trial. See *Riggins* v. *Nevada*, 118 L. Ed. 2d 479, 494, 112 S. Ct. 1810, 1819 (1992) (Kennedy, J., concurring). What was his demeanor? The trial judge knew. We do not, and the Court of Appeals did not.

shifts from strict prohibition to a discretionary refusal to relitigate, this same line of cases points in the other direction.

Salinger v. *Loisel*, 265 U. S. 224 (1924) is the cornerstone case. Salinger was a federal prisoner who fought a protracted battle against being removed to South Dakota, where he had been indicted for mail fraud. *Id.*, at 225-226. He fled to New York, was arrested there, and sought habeas relief, which was denied. He then posted bail, fled to New Orleans, was surrendered by his surety there, and again sought habeas relief. *Id.*, at 226-227.

Marshall Loisel asserted that the New York denial was *res judicata*. The Court said it was "unable to go so far." *Id.*, at 230. *Salinger* is thus correctly citable for the proposition that a prior denial of relief is not *res judicata*. See *West*, 120 L. Ed. 2d, at 243, 112 S. Ct., at 2494. But the opinion says much more. *Salinger* construed the statutory language "to dispose of the party as law and justice may require" in this way:

> "A study of the cases will show that this has been construed as meaning that each application is to be disposed of in the exercise of a sound judicial discretion guided and controlled by a consideration of whatever has a rational bearing on the propriety of the discharge sought. Among the matters which may be considered, *and even given controlling weight*, are (a) the existence of another remedy, such as a *right in ordinary course to an appellate review* in the criminal case, and (b) a prior refusal to discharge on a like application." 265 U. S., at 231 (emphasis added).

This statement is followed by a long list of cases, involving both state and federal prisoners, *ibid.*, indicating that the Court saw no difference in the two on the point under discussion. The Court then quoted an opinion by Justice Field as Circuit Justice: "The action of the court or justice on the second application will naturally be affected to some degree by the character of the court or officer to whom the first application was made, and the fullness of the consideration given to it." *Id.*, at 231-232 (quoting *Ex parte Cuddy*, 40 F. 62, 66 (C. C. S. D. Cal. 1889)).

"Had the District Court disposed of the later applications on that ground [prior adjudication], its discretion would have been well exercised, and we should sustain its action without saying

more." *Id.*, at 232. The Court then proceeded to the merits because the District Court had not exercised that discretion. *Ibid.*

Salinger was clear enough on its face that its rule applied equally to state and federal adjudications. If there had been any doubts, however, they were eliminated in *Ex parte Hawk*, 321 U. S. 114 (1944), a unanimous *per curiam* opinion. "Where the state courts have considered and adjudicated the merits of his contentions . . . a federal court *will not ordinarily re-examine* upon writ of habeas corpus the questions thus adjudicated." *Id.*, at 118 (citing *Salinger*, *supra*, 265 U. S., at 230-232 (emphasis added)). The *Hawk* Court then went on to note that if the state provided no remedy, or circumstances rendered it inadequate (citing *Moore* v. *Dempsey*, 261 U. S. 86 (1923)), the federal court should proceed. *Hawk*, 321 U. S., at 118.

Justice O'Connor's *West* opinion also relies on *Darr* v. *Burford*, 339 U. S. 200, 214 (1950). *Darr* reaffirms the discretionary rule of *Salinger* and *Hawk*. The *Darr* Court was divided on whether a defendant was required to petition for a writ of certiorari from this Court before filing his federal habeas petition. That question vexed the Court for some time. See *Ex parte Hawk*, *supra*, 321 U. S., 116-117 (yes); *Wade* v. *Mayo*, 334 U. S. 672, 680-681 (1948) (not if denial was likely); *Darr*, 339 U. S., at 217 (yes); *Fay* v. *Noia*, 372 U. S. 391, 435 (1963) (no, overruling *Darr* on this point).

No such division attended the question of whether a federal habeas court had discretion to deny a petition on the ground the questions had been adjudicated in the state courts. Both opinions reaffirmed the *Salinger/Hawk* rule.

> "Even after this Court has declined to review a state judgment denying relief, other federal courts have power to act on a new application by the prisoner.[40] On that application, the court may require a showing of the record and action on prior applications, and *may decline to examine further into the merits because they have already been decided against the petitioner.*[41]

"40. *Ex parte Royall*, 117 U. S. 241.

"41. *Salinger* v. *Loisel* . . . ."

Darr, 339 U. S., at 215 (emphasis added). Significantly, both cases cited involved disputes of pure law on undisputed facts. See *Ex parte Royall*, 117 U. S. 241, 242-243 (1886) (act admitted, constitutionality of law only issue); *Salinger*, 265 U. S., at 233-234 (construction of mail fraud statute).

The dissent also acknowledged that *Salinger* held that "prior denials carry considerable weight in disposing of a later application . . . ." *Id.*, at 224 (Frankfurter, J., dissenting); see also *id.*, at 225 ("discretionary aspect of habeas corpus").

What happened to the discretion so clearly and firmly vested in the district courts as of 1950? *Salinger* and *Hawk* have not been overruled, and *Darr* has not been overruled on this point. No convincing reason has been put forth why federal courts must relitigate *every* question of federal constitutional law in *every* state criminal case regardless of the care and thoroughness of the state court's consideration. Yet the discretion seems to have vanished in a puff of blue smoke in 1953.

Amicus has previously briefed to this Court our reasons for doubting whether *Brown* v. *Allen*, 344 U. S. 443 (1953) really does stand for the proposition of mandatory *de novo* relitigation of every question of federal constitutional law. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Wright* v. *West*, O. T. 1991, No. 91-542 ("CJLF *West* Brief"), pp. 14-16. We will not repeat these arguments here. However, the audacity of Justice Frankfurter's assertions in his concurring opinion are worth noting.

The crux of the present issue lies in Justice Frankfurter's statement on page 513: "It is inadmissible to deny the writ merely because a State court has passed on a Federal constitutional issue." Justice Frankfurter cites no precedent for this remarkable statement, for a very good reason. The precedents are clearly and flatly contrary. *Salinger* says the precise opposite in words clear beyond dispute. *Hawk* and *Darr* apply the *Salinger* rule unequivocally to prior state adjudications, and even Justice Frankfurter's dissent in *Darr* grudgingly acknowledges the very discretion he denies in *Brown*.

Does the mere passage of time entitle *Brown* to more respect *as* precedent than it gave *to* precedent? Quite the

contrary. *De novo* review may well have been a necessary evil in racial discrimination cases from the South in 1953, but the changes in the nation since then have rendered relitigation far less necessary and much more evil. See CJLF *West* Brief 21-24.

Congressional supporters of unlimited relitigation argued to this Court in *West* that the failure in Congress of proposals to overrule *Brown* constitutes Congressional endorsement. Brief for Senator Biden and Representative Edwards as *Amici Curiae* in *Wright* v. *West*, O. T. 1991, No. 91-542, pp. 10-16. Since that time, Congress has rejected attempts to codify *Brown*. See 139 Cong. Rec. S15818 (1993) (habeas removed from Biden crime bill); 140 Cong. Rec. H2272 (1994) (§ 807 of H. R. 4092); *id.*, at H2420-2421 (1994) (vote 270-159 to remove). Whatever weight failed bills may have, if any, that weight now sits in both pans of the balance.

This Court, and not Congress, expanded the scope of habeas review to nonjurisdictional questions of procedure. See *Withrow* v. *Williams*, 123 L. Ed. 2d 407, 437, 113 S. Ct. 1745, 1768 (1993) (Scalia, J., dissenting). This Court, and not Congress, created a host of nonfundamental constitutional issues without stopping to consider whether habeas ought to lie for them as well. See *Rose* v. *Lundy*, 455 U. S. 509, 543, n. 8 (1982) (Stevens, J., dissenting). This Court, and not Congress, stripped the district courts of their *Salinger/Hawk* discretion to decline to reopen fully litigated questions, without any explanation for the change. See *ante*, at 10-13.

Thus, when a federal court of appeals overturns the unanimous judgment of three or four courts, both state and federal, and wrongly grants habeas relief to a properly convicted felon, this Court bears a special responsibility to correct that injustice. Yet glaring errors by the courts of appeals occur with distressing frequency, and this Court cannot correct them all. See, *e.g.*, *Adamson* v. *Ricketts*, 865 F. 2d 1011 (CA9 1988) (en banc), cert. denied *sub nom.* *Lewis* v. *Adamson*, 497 U. S. 1031 (1990) (hired assassin for organized crime, decision contrary to *Walton* v. *Arizona*, 497 U. S. 639 (1990), *Lewis* v. *Jeffers*, 497 U. S. 764 (1990), and *Alabama* v. *Smith*, 490 U. S. 794 (1989)); *Beam* v. *Paskett*, 3 F. 3d 1301 (CA9 1993), cert. denied *sub nom.* *Arave* v.

Beam, O. T. 1993, No. 93-1380 (April 25, 1994) (misapplication of first *Teague* exception to sane adult convicted of rape and murder); *Hamilton* v. *Vasquez*, 17 F. 3d 1149 (CA9 1994), cert. denied *sub nom. Calderon* v. *Hamilton*, O. T. 1993, No. 93-1652 (June 20, 1994) (habeas granted based on instruction more favorable to defendant than the one upheld in *California* v. *Ramos*, 463 U. S. 992 (1983)).

At the present time, federal habeas corpus may well be causing more injustices than it cures. Restoring *Salinger/Hawk* discretion to the district courts would be a substantial step toward fixing that problem. The discretion would rarely be exercised to shield a clearly wrong state decision, and such an exercise would be reversible as an abuse of discretion. On the other hand, a district court's exercise of that discretion would shield a correct and carefully considered state decision from invalidation by a court of appeals which erroneously disagrees with it, but cannot say it was unquestionably wrong. The number of wrongful grants calling for this Court's intervention would be reduced.

The discretionary compromise outlined above has the potential to heal the fracture left by *Wright* v. *West*. *Amicus* respectfully submits that the Court should grant certiorari to entertain full briefing and argument on this important question. Should the Court decide to restore the rule of *Salinger* and *Hawk*, the present case would easily pass muster as one where the district judge could decline to reopen the question determined by the state courts, and the case could be remanded to the District Court for exercise of that discretion.

CONCLUSION

The writ of certiorari should be granted.

August, 1994

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(4)

No. 94-97

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
SEP 8 1994
OFFICE OF THE CLERK

OCTOBER TERM, 1994

JOHN B. TAYLOR, WARDEN,
STAUNTON CORRECTIONAL CENTER,

Petitioner,

V.

WILLIAM EVANS-SMITH,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION TO MOTION TO FILE AND BRIEF AMICUS CURIAE

*Gerald T. Zerkin
GERALD T. ZERKIN AND ASSOC.
Linden Tower Professional Centre
Suite 505
2nd & Franklin Streets
Richmond, Virginia 23219
(804) 788-4412

Ann B. Vance
CARR AND VANCE
29 N. King Street
Leesburg, Virginia 22075
(703) 777-3434

Counsel of Record *Counsel for Respondent*

LANTAGNE DUPLICATING SERVICES
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

25 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REASONS FOR DENYING THE MOTION AND ARGUMENT 1

I. THE *JACKSON v. VIRGINIA* STANDARD IS CLEAR AND WAS PROPERLY APPLIED BY THE COURT OF APPEALS 1

II. THE DOCTRINE OF NONRETROACTIVITY IS NOT IMPLICATED BY THE DECISION BELOW . 12

III. THIS CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RECONSIDERATION OF ESTABLISHED PRINCIPLES OF LAW SIMPLY BECAUSE THE AMICUS WISHES TO EVISCERATE FEDERAL HABEAS CORPUS 13

CONCLUSION 20

TABLE OF AUTHORITIES

Cases:

Ake v. Oklahoma, 470 U.S. 68 (1985) 17, 18

Batson v. Kentucky, 476 U.S. 79 (1986) 18, 19

Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981) 16

Estelle v. McGuire, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) 8, 9, 11

Evans v. Johnson, (Alexandria Cir. Ct., 5/14/85) 15

Giarratano v. Murray, 492 U.S. 1 (1989) 15, 16

Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987) 19

Jackson v. Virginia, 443 U.S. 307 (1979) . . . . . passim

James v. Commonwealth, 247 Va. 459 S.E.2d 396 (1994) 19

People v. Smith, 565 N.E.2d 900 (Ill. 1991) 8

Saunders v. Reynolds, 214 Va. 697, 204 S.E. 2d 421 (1974) 15

Spencer v. Commonwealth, 238 Va. 295, 384 S.E.2d 785 (1989) 19

Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196 (1991) 19

Townes v. Commonwealth, 234 Va. 307, 362 S.E.2d 650 (1987) 19

Tuggle v. Virginia, 471 U.S. 1096 (1985) 17

Tuggle v. Thompson, 854 F.Supp. 1229 (W.D.Va. 1994) 18

Tuggle v. Bair, 112 S.Ct. 1681 (1992) 17

Virginia Dep't of Corrections v. Clark, 227 Va. 525, 318 S.E.2d 399 (1984) . . 16

Wright v. West, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992) 2, 6, 20

Articles:

Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis In Virginia?*, 57 Va. L.Rev. 3 (1971) 17

REASONS FOR DENYING THE MOTION AND ARGUMENT

I. THE *JACKSON v. VIRGINIA* STANDARD IS CLEAR AND WAS PROPERLY APPLIED BY THE COURT OF APPEALS.

The Amicus' fundamental objection to the decision below is simply that it does not agree with the result. The Amicus cites the standard set forth in Jackson v. Virginia, 443 U.S. 307 (1979) that the habeas court is to consider *all the evidence* in the light most favorable to the Commonwealth, but in fact it urges upon the Court only the latter part of that principle. Like Petitioner, the Amicus would interpret Jackson to require the habeas court to consider only selective portions of the Commonwealth's evidence. Both Petitioner and the Amicus seek a rule that the habeas court should ignore uncontradicted evidence produced by the Commonwealth's own witnesses in analyzing

the sufficiency of the evidence. Both because it is contrary to the intent of Jackson and would defy all logic, the Court of Appeals refused to adopt such a standard. (28A n.29).

The Amicus makes much of Evans-Smith's alleged "lies." It requires a formidable stretch, however, to compare Evans-Smith's alleged misstatements with the testimony of the petitioner in Wright v. West, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992), as the Amicus attempts to do. In Wright, the defendant was found in possession of "over 15 of the items stolen" in a single home burglary, a mere two to four weeks after the crime. 120 L.Ed.2d at 240. Of course, that fact was critical, since it tied him directly to the crime. His explanation, which was thus equally critical, was incomplete and internally inconsistent. 120 L.Ed.2d at 231

& n.1. Thus, the jury was "entitled to disbelieve West's uncorroborated and confused testimony...." (Cites omitted). 120 L.Ed.2d at 241. The factual question for the jury, therefore, was whether, in light of West's prior felony conviction, his testimony plausibly explained his possession of a large number of items taken in a single burglary or, by its implausibility and confusion, simply provided more evidence of guilt. Id.

By contrast, the alleged "lie" of Evans-Smith discussed by the Amicus was an inconsistent statement concerning from which window his wife waved when he departed for work. Amidst the numerous facts as to which Evans-Smith provided information to the police during several interviews, this was indeed a terribly

minor point.[1] It stands in sharp contrast to West's pervasively inconsistent testimony as to the most basic factual issue in his case: why was he in possession of this cache of stolen goods?[2]

---

[1]In addition, unlike West, Colonel Evans-Smith had no prior felony conviction.

[2]The Amicus references other contradictory statements, some of which he states, without explanation, "must certainly be false." *Brief Amicus Curiae*, p.5. The Court of Appeals addressed those statements in detail.

The Amicus also perpetuates the myth that Respondent "attempt[ed] to get a co-worker to change his story about defendant's arrival time at work." *Brief Amicus Curiae*, p.2. As the Court of Appeals noted, no such attempt was made. (25A).

The Amicus raises the jewelry box discovered in the field. *Brief Amicus Curiae*, p.2. The trial court noted that the box "showed remarkably little wear after being recovered approximately two weeks after the offense." (A39). It is entirely unclear why a jewelry box would "wear" sitting in a field for *two weeks*; on its face, the suggestion that such "wear" should be observable after such a brief period is inexplicable. There is no suggestion that the box was not dirty, nor was there any testimony as to what "wear"

The significance of many of the items to which the Amicus does point as subjective indicia of guilt remains elusive. For example, he points to Evans-Smith's "demeanor" and the "unusual questions" he asked when informed of his wife's death. *Brief Amicus Curiae*, p.2. Neither Petitioner nor the Amicus have suggested what factual basis existed by which the jury could determine that his demeanor was inculpating, or what was "unusual," and thus, presumably, inculpating, about the questions he asked. Rather, both argue for the proposition that a jury is free to speculate as to the significance of such subjective evidence, even in the absence of evidence that his

---

one would expect given the moisture, mineral or acid content of the soil and the composition (plastic) of the box. The trial judge's comment is thus factually baseless.

alleged demeanor,[3] or the questions he asked, were unusual *for him*.

To be at all probative, such evidence must relate to the defendant's own personality or background. Thus, for example, questions concerning the crime scene might be unusual coming from a housewife, but not from a suspect trained in crime scene investigation. Similarly, the demeanor of a psychologist when advised of his spouse's death might be very different than that of, say, a Special Forces Colonel under similar circumstances. Nor is there even any reason to believe that all psychologists or all military officers would respond in the same manner.

---

[3]Here, unlike in West, the jury had no opportunity to observe the defendant's demeanor *while testifying*. The Amicus has demonstrated remarkable restraint in not citing Evans-Smith's failure to testify as evidence of guilt.

The Commonwealth made no attempt to demonstrate that Evans-Smith's demeanor, or the questions he asked, were unusual *for him*.

The Amicus suggests that, somehow, the jury's observations of Evans-Smith during the trial would have enabled it to assess his lack of tears, which, according to the Amicus, "rais[ed] an inference that his grief was feigned."[4] *Brief Amicus Curiae*,

---

[4]The Commonwealth, for example, could have introduced evidence that Colonel Evans-Smith tended to wear his emotions on his sleeve or even that someone had seen him cry in the face of death. Given Evans-Smith's Special Forces background, it is hardly surprising that the Commonwealth could not produce such evidence. However, its inability to do so does not provide the jury or state courts license to speculate as to the vagaries of human conduct. This is but one instance among several (e.g., the Commonwealth's failure to prove how long it took Evans-Smith to drive to work during rush hour, or to prove when he arrived at work) in which the Amicus and Petitioner rely on the absence of evidence to support the finding of guilt, and invoke

p.10 n.3. In the final analysis, it would prefer to let the jury simply guess as to what is unusual for Evans-Smith. Such speculation, however, has no part in the criminal justice system. *E.g.*, People v. Smith, 565 N.E.2d 900, 908-09 (Ill. 1991) (prosecutor may not argue inferences not supported by evidence). This Court should reject the concept of guilt by jury speculation, which is urged upon it.

The Amicus simplifies this Court's decision in Estelle v. McGuire, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991) beyond recognition, quoting language to the effect that the evidence there was probative because it "narrowed the class of possible perpetrators to McGuire and his wife." *Brief Amicus Curiae*, p.6, *quoting*, McGuire,

---

the talisman "inference" to disguise that lack of *evidence*.

116 L.Ed.2d at 400. In fact, McGuire demonstrates the weakness of the evidence cited here.

In McGuire, this Court noted that the purpose of the contested evidence was not to identify the perpetrator, but to establish that the injuries suffered by the child were not accidental.

> ...[E]vidence demonstrating battered child syndrome helps to prove that the child died at the hands of another ...; it also tends to establish that the "other," *whoever it may be*, inflicted the injuries intentionally. When offered to show that certain injuries are a product of child abuse, rather than accident, evidence of prior injuries is relevant even though it does not purport to prove the identity of the person who might have inflicted those injuries. (Cites omitted) (Emphasis added).

116 L.Ed.2d at 396. The evidence, therefore, was relevant because it helped prove that the child did not die accidentally. 116 L.Ed.2d at 396-97.

In upholding the jury instruction in that case, this Court did make the observation noted by the Amicus. However, the Amicus omits any reference to the substantial additional evidence which established the nexus between McGuire and the "intentional act," evidence which did not merely narrow the class to McGuire and his wife, but to McGuire alone. 116 L.Ed.2d at 400. Under the jury instructions, the battered child syndrome evidence was relevant to the question of guilt only *after* the jury had found that McGuire had committed those other acts.

Here, on the other hand, the Amicus argues that the jury should have been able to consider, and the federal courts were compelled to consider, evidence as to which no such nexus was established, based upon the speculative answer to the inquiry

"[w]ith whom is a married woman, with no children at home, *likely* to argue at six in the morning?"[5] (Emphasis added). *Brief Amicus Curiae*, p.6. Contrary to the rationale in McGuire, the Amicus would allow identification of the perpetrator to be based on evidence *not* independently tied to the defendant. The suggestion that the evidence here was "similarly probative" (*id.*) to that in McGuire is thus absurd and the analogy fails miserably.[6]

---

[5]The Amicus invokes "six in the morning" as if that was the proven time of death -- it was not. As Respondent has demonstrated, the time of death could have been as late as 8:00. *Brief in Opposition*, pp. 20-21. Thus, the speculative question it posits is itself based on its further speculation that (1) the killing must have been the result of an argument and (2) the time of death was at "six in the morning."

[6]The evidence here is so weak that the Amicus is forced to fill in the blanks with a statistical compilation as to motives for murder. *Brief Amicus Curiae*, p.6.

The factual analyses of both Petitioner and the Amicus are replete with assumptions and inferences of guilt based upon the *absence* of evidence. It is thus abject speculation to which the Amicus would ask the federal courts to defer.

II. THE DOCTRINE OF NONRETROACTIVITY IS NOT IMPLICATED BY THE DECISION BELOW.

The argument advanced by both the Amicus and Petitioner is predicated on the notion that the government's burden to prove guilt beyond a reasonable doubt, a standard which, incidentally, goes without mention by the Amicus, is met even where it requires the court to ignore the prosecution's own evidence. It is that reworking of Jackson, rather than the Court of Appeals' consideration of all the Commonwealth's evidence, that seeks a "new rule."

As Respondent has discussed this issue in his Brief In Opposition, and the Amicus has added little to the debate beyond cute phrasemaking, Respondent does not address the question further here.

III. THIS CASE DOES NOT PROVIDE AN APPROPRIATE VEHICLE FOR RECONSIDERATION OF ESTABLISHED PRINCIPLES OF LAW SIMPLY BECAUSE THE AMICUS WISHES TO EVISCERATE FEDERAL HABEAS CORPUS.

The Amicus seeks to use this case to promote its own agenda: the elimination of meaningful habeas corpus review. This case is in no sense unique for that purpose, but, as with any successful Jackson claim, it provides a convenient vehicle for that agenda.

While paying lip service to the value of federal habeas review, the Amicus would plainly not be disappointed by its demise. It makes the incredible suggestion that federal review under Jackson should give

way to what is *not* in the record, that the federal courts should show deference to the trial judge's opportunity to observe non-evidence, *to wit*, Evans-Smith's demeanor at trial, *Brief Amicus Curiae*, p.10 n.3, even in the absence of any reference to that by the trial court.[7] Thus, the Amicus' respect for habeas corpus would extend no further than an inquiry as to what the trial court might have observed which is not of record. Its protestations as to the importance of habeas review certainly can not be taken seriously. The last thing it

---

[7]While the Amicus argues that deference is due the trial judge's findings because he observed the proceedings, *Brief Amicus Curiae*, p.10, it also argues that deference is due as to matters which the trial judge observed but made no reference. *Id.*, n.3. At a minimum, consistency would demand that the judge's silence as to such a circumstance be treated as an implication that it was not a factor suggesting guilt.

wants this Court to do is "put some meat on Jackson's bones." *Id.*, p.4. It would plainly prefer to strip it bare.

Federal habeas corpus remains an essential safeguard because not all state courts are committed to the enforcement of constitutional rights. *See*, Giarratano v. Murray, 492 U.S. 1, 23-24 (1989) (Stevens, J. dissenting) (federal habeas relief granted in 60% to 70% of capital cases). In Virginia itself, only one capital habeas petitioner has been granted relief, and then only because the Commonwealth conceded error.[8] The Virginia Supreme Court has granted review as to only two such cases,[9]

---

[8] Evans v. Johnson, (Alexandria Cir. Ct., 5/14/85).

[9] Review by the Virginia Supreme Court, other than the direct appeal of death verdicts, is obtained by writ of error, the denial of which is a decision on the merits. Saunders v. Reynolds, 214 Va. 697,

affirming the *denial* of relief in one, Coppola v. Warden, 222 Va. 369, 282 S.E.2d 10 (1981), and reversing the *granting* of relief in the other. Virginia Dep't of Corrections v. Clark, 227 Va. 525, 318 S.E.2d 399 (1984).[10] Thus, in only one case out of more than fifty has any such petitioner obtained relief from the Virginia courts.[11] This result should surprise no one, given that, even 23 years ago, the Virginia Supreme Court could not actually give a merits review to each case presented, a circumstance which clearly applied to the consideration of habeas

---

700-01, 204 S.E.2d 421 (1974).

[10]Clark ultimately obtained relief in federal court.

[11]As Justice Stevens noted in Giarratano, the success rate in non-capital habeas cases tends to be dramatically lower than in capital ones, even in federal court. 492 U.S. at 23-24.

corpus petitions. Graham C. Lilly & Antonin Scalia, *Appellate Justice: A Crisis In Virginia?*, 57 Va. L.Rev. 3, 6-8, 14-16 (1971).[12]

By way of example, this Court remanded the case of Tuggle v. Virginia, 471 U.S. 1096 (1985) for reconsideration in light of Ake v. Oklahoma, 470 U.S. 68 (1985). The Virginia Supreme Court reaffirmed, *even though the Commonwealth conceded Tuggle was entitled to a new sentencing hearing.* Tuggle v. Commonwealth, 230 Va. 99, 384 S.E.2d 838 (1985). Tuggle's state habeas corpus petition was dismissed, which was affirmed by the Virginia Supreme Court. *See*, Tuggle v. Bair, 112 S.Ct. 1681 (1992).

---

[12] As was properly suggested there, "no man's ... liberty should be disposed of by unappealable determination of a single individual ...," the consequence of a discretionary review system, even if it is disguised as a merits review. Id. at 16.

Tuggle's *federal* habeas corpus petition was then granted on six separate constitutional grounds, including the Ake issue and the denial of a right to a fair trial, Tuggle v. Thompson, 854 F.Supp. 1229 (W.D.Va. 1994), fundamental errors to which the Virginia courts had turned a deaf ear. Thus, the suggestion that "changes in the nation" have "rendered relitigation far less necessary and much more evil" is indefensible, even beyond its fantastic premise that effective habeas corpus review was necessary only because of "racial discrimination cases from the South in 1953" and that race discrimination, in the South or elsewhere, has been effectively addressed by our judicial system.[13]

---

[13]Claims under Batson v. Kentucky, 476 U.S. 79 (1986) provide an obvious barometer of a court's commitment to enforcing race-based constitutional rights in criminal

Respondent is at a disadvantage, because the Amicus references arguments contained in a brief not filed in this

---

cases. The Virginia Supreme Court has rejected every Batson claim it has considered. In fact, it has summarily rejected all but one such claim, James v. Commonwealth, 247 Va. 459, 463, 442 S.E.2d 396 (1994), its other six published decisions coming in death penalty cases, where review is mandatory. *See*, Gray v. Commonwealth, 233 Va. 313, 356 S.E.2d 157 (1987); Townes v. Commonwealth, 234 Va. 307 362 S.E.2d 650 (1987); Spencer v. Commonwealth, 238 Va. 295, 384 S.E.2d 785 (1989); Stockton v. Commonwealth, 241 Va. 192, 402 S.E.2d 196 (1991). The Court's failure to even review more than one such case in the eight years since Batson demonstrates extraordinary indifference to race discrimination in the criminal justice system. In the one case in which it did grant a writ of error, the Court accepted the prosecutor's *religiously* discriminatory justification for his racially discriminatory strike. James, *supra*. Are we actually to conclude from this that the Virginia courts are to be trusted with the enforcement of federally protected rights? *See*, James, 247 Va. at 464, 442 S.E.2d at 399 (Hassell, J. dissenting). If "race discrimination in the South" did provide the impetus for the *de novo* standard of review, in Virginia at least, a new day has not yet dawned.

case. *See, Brief Amicus Curiae*, p. 13. However, Justice O'Connor thoroughly addressed this identical argument in Wright v. West, 120 L.Ed.2d at 242-46. Most relevant to the instant case, Justice O'Connor pointed out that this Court specifically rejected use of a deferential standard in Jackson itself. 120 L.Ed.2d at 246, *citing*, Jackson, 443 U.S. at 323, 324. Respondent, therefore, defers to Justice O'Connor's exposition on the subject.

CONCLUSION

For the foregoing reasons, the Motion and Petition should be denied.

Respectfully submitted,

* GERALD T. ZERKIN, ESQ. #16270
ANN B. VANCE, ESQ. #30008

GERALD T. ZERKIN, ESQ.
Linden Tower Professional Centre, Suite 505
2nd & Franklin Streets
Richmond, Virginia 23219
Tel: (804) 788-4412
Fax: (804) 649-8547
Counsel of Record

ANN B. VANCE, ESQ.
29 North King Street
Leesburg, Virginia 22075
(703) 777-3434

* Counsel of Record

October, 1994 TERM

(5)

Supreme Court, U.S.
FILED
SEP 16 1994
OFFICE OF THE CLERK

No. 94-97

In The

Supreme Court of the United States

October Term, 1994

JOHN B. TAYLOR, WARDEN, STAUNTON CORRECTIONAL CENTER,

Petitioner,

v.

WILLIAM EVANS-SMITH,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONER'S REPLY BRIEF

JAMES S. GILMORE, III
Attorney General of Virginia

* JOHN H. MCLEES, JR.
Assistant Attorney General

Office of the Attorney General
Supreme Court Building
101 North Fighth Street
Richmond, Virginia 23219
(804) 786-4624
Counsel for Petitioner

*Counsel of record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

4PP

PETITIONER'S REPLY BRIEF

If there were any doubt that this case cries out for certiorari review, it has surely been eliminated by respondent's brief in opposition. When respondent addresses, fleetingly and reluctantly, the heart of petitioner's complaint that the Fourth Circuit required basic facts and preliminary inferences to be individually proven beyond a reasonable doubt, *he does not deny that the Fourth Circuit did so,* but argues that there is no difference between basic facts and preliminary inferences on the one hand and the ultimate inferences constituting the elements of the offense on the other:

> [T]he characterization of any particular evidence as basic facts and preliminary inferences is a fiction when the singular objective of Petitioner is to identify Respondent as the murderer.

(Brief in Opposition, p. 31).

Respondent thus implicitly acknowledges that, under his view and that of the Fourth Circuit, basic facts and preliminary inferences must be individually proven beyond a reasonable doubt, and that the Fourth Circuit adopted exactly the new rule about which petitioner complains. That rule is inconsistent with *Jackson v. Virginia,* 443 U.S. 307 (1979), and the other decisions of this Court cited in the petition for certiorari and in conflict with the express holdings cited in the petition from the First, Second, Fifth, and Sixth Circuits, and from the appellate courts of Arkansas, California, Idaho, Indiana, North Carolina, New Hampshire, Illinois, and Massachusetts. Respondent and the Fourth Circuit also are at odds with the clear distinction this Court drew between preliminary

factual issues and ultimate facts in *Schad v. Arizona*, 111 S. Ct. 2491 (1991): "Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." 111 S. Ct. at 2497, *citing McKoy v. North Carolina*, 494 U.S. 433, 449 (1990) (Blackmun, J., concurring).

Essentially, respondent argues that the decision of the Fourth Circuit is unreviewable by this Court because the Fourth Circuit opinion recited the appropriate catch phrases from *Jackson*. Thus, under respondent's jurisprudence, a lower court may with impunity do as it wishes, as long as it recites that it is following the applicable precedent from this Court.[1]

The balance of respondent's defense of the opinion below consists, inevitably, of doing exactly what the Fourth Circuit did: ignoring the command of *Jackson* that a reviewing court defer to the jury's reasonable resolution of conflicting inferences and arguing that the jury should have drawn from the testimony inferences other than the demonstrably reasonable inferences which it drew.[2]

---

[1] Even if this twisted view of the law were correct, of course, the Fourth Circuit's decision in the instant case would still call for review and reversal by this Court, because, despite its *pro forma* recitations of various phrases from *Jackson*, the Court of Appeals, in its final analysis, astoundingly acknowledged (see cert. pet. appendix, 28A) that it was adhering to its own erroneous logic in *West v. Wright*, 931 F.2d 262 (4th Cir. 1991), which every member of this Court agreed was flat wrong and a gross misapplication of *Jackson*. *Wright v. West*, 112 S. Ct. 2482 (1992).

[2] Respondent attempts to minimize the Fourth Circuit's appalling acknowledgment (see cert. pet. appendix, 12A, n. 11)

Obviously, the Fourth Circuit still does not understand the *Jackson* standard, despite this Court's teaching in *Wright v. West*. Its analysis in the instant case was a gross distortion of *Jackson*, and was thus an unauthorized and erroneous new rule. It is extremely important that this Court grant certiorari in this case to establish clear guideposts for greater uniformity and fairness in the application of *Jackson*.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, this Court should summarily reverse the decision of the Court of Appeals.

Respectfully submitted,

JAMES S. GILMORE, III
Attorney General of Virginia

*JOHN H. MCLEES, JR.
Assistant Attorney General

September, 1994

Counsel of record

---

that it was counting heads among witnesses in order to reach a different conclusion than that reached by the jury by explaining that this acknowledgement came in a footnote. (Brief in Opposition, p. 34, n. 16).